124-465

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1009.

JOSEPH J. SMITH, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED AUGUST 23, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 30, 1887.

1 Supreme Court of the State of Alabama. December term, 1886.

TUESDAY, *December 7th*, 1886.

Be it remembered that a regular term of the supreme court of the State of Alabama was begun and holden according to law at the capitol, in the city of Montgomery, on Tuesday, the seventh day of December, A. D. 1886, it being the first Tuesday of said month.

Present and presiding as judges of said court: Hon. George W. Stone, chief justice; Hon. Henderson M. Somerville, associate justice; Hon. David Clopton, associate justice.

Supreme Court.

THURSDAY, *July 27th*, 1887.

The court met pursuant to adjournment.

Present: All the justices.

Of the record and proceedings had before the Honorable Oliver J. Semmes, judge of the city court of Mobile, in a certain case lately pending before said judge upon a writ of *habeas corpus*, and
2 in which case the State of Alabama was plaintiff and Joseph J. Smith was defendant, which case was determined by the Honorable Oliver J. Semmes, judge, on the 22nd day of July, A. D. 1887, and was appealed to the May term, A. D. 1887, of the supreme court of Alabama.

Mittimus.

THE STATE OF ALABAMA, *County of Mobile:*

To the sheriff of Mobile county, Greeting:

Whereas on the 16th day of July, A. D. 1887, one Joseph J. Smith was duly examined before me, Edwin Tardy, a justice of the peace in and for said county of Mobile, in State of Alabama, upon the charge of handling, engineering, driving, and operating an engine pulling a passenger train upon the Mobile and Ohio railroad, used in transporting passengers within the county of Mobile and State of Alabama, without having obtained a license from the board of examiners appointed by the Governor of said State in accordance with the provisions of an act entitled "An act to require locomotive engineers in this State to be examined and licensed by a board to be appointed by the Governor for that purpose," approved February 28th, 1887, and after more than three months had elapsed
3 from the date of appointment and qualification of said board, and it appearing to the said justice of the peace that said Joseph J. Smith is guilty of said charge, you are hereby commanded to receive into your custody the body of the said Joseph J. Smith and commit him to the jail of said county of Mobile, and him safely keep until the next term of the city court of Mobile, so that he may then and there be required to answer the said charge, unless he shall give satisfactory security in the sum of two hundred dollars,

conditioned upon his appearing at the next term of said city court to answer the charge aforesaid, or unless discharged by due course of law. Herein fail not.

Witness my hand and seal this 16th day of July, A. D. 1887.

EDWIN TARDY,
Justice of the Peace in and for Mobile Co., Ala.

Petition.

STATE OF ALABAMA, *County of Mobile:*

To the Honorable Oliver J. Semmes, judge of the city court of Mobile:

Your petitioner, Joseph J. Smith, respectfully showeth unto your honor that your petitioner is unjustly and unlawfully held and detained in custody by Dick Roper, sheriff of Mobile county, State of Alabama, who refuses to discharge and set him at liberty. Your petitioner further represents that the General Assembly of the
4 State of Alabama passed an act entitled "An act to require locomotive engineers in this State to be examined and licensed by a board to be appointed by the Governor for that purpose," approved February 28th, 1887.

Your petitioner further shows that said act, among other things, provides that it shall be unlawful for any engineer of any railroad train in the State of Alabama to drive or operate or engineer any train of cars or engine upon the main line or road of any railroad in the said State which is used for the transportation of persons, passengers, or freight without first undergoing an examination once and obtaining a license; that every locomotive engineer operating or driving an engine as aforesaid shall apply to the board of examiners and be examined by said board or by two or more of the members thereof in practical mechanics concerning his knowledge of operating a locomotive engine and his competency as a locomotive engineer. Said act further provides that upon the examination of any engineer, if the applicant is found competent, he shall, upon payment of five dollars, receive a license, which shall be signed by each member of the board, which shall set forth the fact that said engineer has been duly examined as required by the said act
5 and is authorized to engage as an engineer on any of the railroads in the said State. Said act further provides that for every examination the board or members thereof making the examination shall be paid five dollars by the applicant. Said act further provides that all engineers now employed in running or operating engines upon railroads in the State shall have three months after the appointment of said board in which to be examined and obtain license. Said act further provides that any engineer violating the provisions of said act shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty nor more than five hundred dollars, and may also be sentenced to hard labor for the county for not more than six months.

Your petitioner further shows that said act is found on pages 100–102 of the acts of Alabama 1886–'87, and is made a part of this petition and will be referred to as often as may be necessary.

Your petitioner further shows unto your honor that at the time said act was passed and went into effect your petitioner had been and was and is now in the service of the Mobile and Ohio Railroad Company as a locomotive engineer, operating and driving an
6 engine engaged in pulling a passenger train of said railroad, carrying the United States mail and passenges from the State of Alabama to the States of Mississippi, Tennessee, Kentucky, Illinois, and Missouri, and from Corinth, Miss., to Mobile, Ala., drawing the United States mail, express car and passengers being transported from one State to another, and said train running from Mobile, Ala., to St. Louis, Missouri, and *vice versa*.

Your petitioner further shows unto your honor that as such locomotive engineer he is engaged in operating a locomotive engine on said Mobile and Ohio Railroad between Mobile, Alabama, and Corinth, Mississippi, and which is employed in the transportation of "commerce among the States," and as such engineer your petitioner charges that he is an instrument employed in the business of "interstate commerce," and to enforce said act against your petitioner would be to impose a burden or obstruction upon "commerce among the States."

Your petitioner further shows unto your honor that while he was engaged in the business of "commerce among the States," to wit, handling and operating an engine drawing a train of cars devoted to "commerce among the States"—that is, in running from Mobile, Alabama, to St. Louis, Missouri—your petitioner's duties and
7 employment require him to run from Mobile, Alabama, to Corinth, Mississippi, sixty miles of said run being in Alabama and two hundred and sixty-five miles being in Mississippi, and, as such instrument of "commerce among the States," he is subject to the exclusive power of Congress, as provided in the Constitution of the United States; that your petitioner was arrested by a constable of Mobile county, State of Alabama, for not having obtained a license, as provided by the act hereinbefore specified, upon a warrant issued by Justice of the Peace Edwin Tardy, of Mobile county, State of Alabama, and was carried before said Edwin Tardy, justice of the peace in and for the county of Mobile, State of Alabama, who, upon hearing, committed your petitioner to jail in said county until the next session of the city court of Mobile, to be and appear before said court on the — day of ——, A. D. 1887, to answer the charge of having violated the provisions of the act of — Alabama hereinbefore mentioned, or requiring your petitioner, in order to avoid going to jail under said commitment, to give a bond in the sum of two hundred dollars.

Your petitioner further shows unto your honor that the act of the Legislature of Alabama hereinbefore specifically designated is a regulation of "commerce among the States" in so far as it has at-
8 tempted to enforce the provisions thereof upon and against your said petitioner, which your petitioner avers is beyond

the jurisdiction and power of the said State of Alabama to enforce said act against and upon your petitioner.

Your petitioner further shows that, inasmuch as he is engaged in "commerce among the States," that the attempt to compel your petitioner to comply with the provisions of said act and to enforce the penalties thereof against your petitioner for his refusal to comply therewith is an usurpation of power not confided to the State of Alabama or its authorities and is in violation of the Constitution of the United States, article 1, section 8, paragraph 3.

Your petitioner therefore shows that he is unjustly and unlawfully detained of his liberty in violation of article 1, section 8, paragraph 3, of the Constitution of the United States.

Your petitioner therefore prays that your honor will direct to be issued a writ of *habeas corpus*, returnable forthwith, in such cases made and provided, against the said Dick Roper, sheriff of Mobile county, State of Alabama, or such other persons in whose custody your petitioner may be found, that cause may be shown, if any exist, why your petitioner should not be discharged and set free.

And — in duty bound your petitioner will ever pray, &c.

9

J. J. SMITH,
E. L. RUSSELL, &
B. B. BOONE,
Attorneys for Petitioner.

Subscribed & sworn to before me this 16th day of July, A. D. 1887.

JOHN F. POWERS,
Clerk of the City Court of Mobile.

Writ of Habeas Corpus.

STATE OF ALABAMA, *County of Mobile:*

To Dick Roper, sheriff of Mobile county, Greeting:

You are hereby commanded to bring before me, Oliver J. Semmes, judge of the city court of Mobile, on Monday morning, July 18th, A. D. 1887, at nine o'clock a. m., in the city court-room, the body of Joseph J. Smith and show the cause of his detention.

OLIVER J. SEMMES,
Judge of the City Court of Mobile.

Return of the Sheriff.

And in compliance with the above order I have the body of Joseph J. Smith now in court.

DICK ROPER, *Sheriff,*
By J. P. KENNY,
Deputy Sheriff.

Hearing Upon the Return of the Writ.

Joseph J. Smith, being duly sworn according to law, on oath testified in his own behalf as follows:

I am a locomotive engineer in the service of the Mobile & Ohio Railroad Company, a corporation owning and operating a
10 line of railroad forming a continuous and unbroken line of railway from Mobile, in the State of Alabama, to St. Louis, in the State of Missouri, and as such locomotive engineer I was engaged in handling, operating, and driving a locomotive engine attached to a regular passenger train on the Mobile & Ohio railroad, and which said train consisted of a postal car, carrying the United States mail to all parts of the Union; a Southern Express car, which had perishable freight, money packages, and other valuable merchandise destined to Mississippi, Tennessee, Kentucky, and other States; also passenger coaches and a Pullman palace sleeping car, which said passenger coaches and Pullman palace sleeping car were occupied by passengers to be transported by said train to the States of Mississippi, Tennessee, Kentucky, &c., all of which were to be drawn by the engine controlled, handled, operated, and driven by myself.

That on Saturday, the sixteenth day of July, A. D., 1887, within the county of Mobile and State of Alabama, while I was thus handling and operating the engine upon a portion of the main line of the Mobile & Ohio railroad lying and being within said county and State, and which said engine was drawing the United States postal car, the Southern Express car, the passenger coaches, and the Pullman palace sleeping car, the said cars, coaches, and
11 sleeping car being loaded with the United States mail and the merchandise above enumerated and occupied by passengers destined to the States mentioned, I was arrested by a constable of the county of Mobile, State of Alabama, for failing, neglecting, and refusing to procure a license in accordance with an act of the legislature of the State of Alabama. My run as a locomotive engineer in the service of the Mobile & Ohio Railroad Company was regularly from the city of Mobile, county of Mobile, and State of Alabama, to Corinth, Mississippi, sixty miles of which run was in the State of Alabama, and two hundred and sixty-five miles in the State of Mississippi. I never, as a locomotive engineer in the service of said Mobile & Ohio Railroad Company, handled and operated an engine or an engine pulling a train of cars whose destination was a point within the State of Alabama when said engine or engine and train of cars started from a point within the State of Alabama. My employment as a locomotive engineer in the service of the Mobile & Ohio Railroad Company requires me to handle, drive, and operate an engine attached to a passenger train loaded with merchandise, carrying the United States mail, and transporting passengers,
12 as I have before stated. Said train starts at Mobile, Ala., and runs through without change of coaches or cars on one continuous trip. My employment as locomotive engineer in the service

of said Mobile & Ohio Railroad Company also requires me to take charge of and handle, drive, and operate an engine drawing a passenger train which starts from St. Louis, Mo., destined to the city of Mobile, in the State of Alabama, said train being loaded with merchandise and occupied by passengers destined to Alabama and other States. This engine and train I take charge of at Corinth, in the State of Mississippi, and I handle, drive, and operate the same along and over the Mobile & Ohio railroad through the States of Mississippi and Alabama to the city of Mobile, in the State of Alabama. It frequently happens that I am ordered by the proper officers of the Mobile & Ohio Railroad Company to handle, drive, and operate an engine drawing a passenger train loaded with merchandise, carrying the United States mail, and occupied by passengers, as I have stated, from the city of Mobile, within the State of Alabama, to the city of St. Louis, within the State of Missouri, I, as engineer of said train, being allowed two lay-overs. Said train passes through the States of Alabama, Mississippi, Tennessee,
13 Kentucky, Illinois, and into the State of Missouri. I have not obtained the license as required by the act of the General Assembly of the State of Alabama approved February 28th, 1877, and I have not applied to said board of examiners or any of its members for the license mentioned in said act. I am aware of the fact that more than three months has elapsed since the appointment and qualification of said board of examiners, said board having been duly appointed by the Governor of the State of Alabama under the provisions of said act.

Order of Judge Semmes Remanding the Defendant to the Custody of the Sheriff.

The supreme court of the State of Alabama having decided the act in question to be constitutional, the petitioner, Joseph J. Smith, will be remanded to the custody of the sheriff, who will release him on bail in the sum of one hundred dollars to appear at the next term of the city court of Mobile, to answer any indictment that may be found for running a train of cars in the State of Alabama.

Given under my hand this the 22nd day of July, 1887.

O. J. SEMMES,
Judge of the City Court of Mobile.

The foregoing is a true transcript of the proceedings had before me, O. J. Semmes, judge of the city court of Mobile, in the
14 case of The State of Alabama *vs.* Joseph J. Smith, on *habeas corpus.*

Given under my hand and seal this the 23rd day of July, A. D. 1887.

O. J. SEMMES,
Judge of the City Court of Mobile.

1 div. 596. Filed July 26th, 1887.

JOHN W. A. SANFORD, *Clerk.*

Mobile City Court, 1 Div.

JOSEPH J. SMITH
vs.
THE STATE OF ALABAMA. } 596.

Come the parties, by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of said city court there is no error. It is therefore considered that the judgment of said city court be in all things affirmed. It is also considered that the appellant pay the costs of appeal in this court and in the city court.

Affirmed on the authority of McDonald *vs.* The State, decided at the present term.

SOMERVILLE, *J.*

Supreme Court of Alabama. December Term, 1886–'87. 3 Division.

15 LORENZO D. McDONALD
vs.
THE STATE OF ALABAMA. } 112.

Appeal from Montgomery city court.

SOMERVILLE, *J.:*

The act of 1886–'87, pp. 100–102, requires locomotive engineers in this State to be licensed, after examination as to competency and fitness by a board authorized to be appointed by the Governor for that purpose. Acts 1886–'87, pp. 100–102. It is insisted that the act is unconstitutional for several reasons.

The first objection is that it is a regulation of commerce between the States, and for this reason violative of the clause of the United States Constitution which vests in Congress the power to regulate such commerce.

In our opinion it is a mere internal police regulation which was competent to be provided for by the State as a proper mode of preserving the safety of the travelling public and other persons whose lives may well be imperilled by the negligence of ignorant and incompetent engineers. It incidentally affects interstate commerce, but does not amount to a regulation any more than laws licensing,

16 by State authority, pilots of vessels engaged in such commerce, which have always been held free from constitutional objection. The laws of the several States have undertaken not only to license pilots in such cases, but have gone so far as to regulate the whole subject of pilotage and pilots, fixing their qualifications, employment, and pay, including the tender of services, and, on refusal to employ, authorizing the recovery of half pay. These laws have been sustained, not on the ground that Congress had recognized them as valid, for it is clear that no such recognition could confer any constitutional power on the States which they did not already possess, but upon the ground that they were necessary

police regulations, having in view the public safety; or, if regulations of commerce in a certain sense, they were local regulations of such a nature as to be permissible until Congress itself undertook to exercise the same power by legislating on the subject. Cooley *vs.* The Board of Wardens of Philadelphia, 12 How. (U. S.), 143; *Ex Parte* Niel, 13 Wall., 236.

There are many police regulations of this nature, incidentally affecting commerce, which have been sustained by the courts. It is well settled that the States may pass laws requiring railroads running from one State to another to fence their tracks; to ring a
17 bell or blow a whistle on approaching a crossing or highway; to erect gates or bridges and keep flagmen at dangerous places on highways; to stop for reasonable times at certain stations; to fix and post printed time-tables, rates of fair and freights, and other things of like character having reasonably in view *of* the prevention of fraud and extortion or other injury and the preservation of the safety of the public. Railroad Company *vs.* Fuller, 17 Wall., 560; Mobile, etc., R. R. Co. *vs.* State, 51 Miss., 137; Com. *vs.* Eastern R. R. Co., 103 Mass., 254; S. C. 4 Amer. Rep., 555; People *vs.* Boston & Alb. R. R. Co., 70 N. Y., 569; Railroad Commissioners *vs.* Portland, etc., R. R. Co., 63 Me., 269; S. C. 18 Amer. Rep., 208; Davidson *vs.* State, 4 Tex. Ct. App., 545; S. C. 30 Amer. Rep., 166; Tiedeman Lim. of Police Powers, § 134; Cooley's Const. Lim. (5th ed.), 579, *et seq.*

The exaction of a license in such a case does not impose a direct burden upon interstate commerce or interfere directly with its freedom. It only "acts indirectly upon the business through the local instruments to be employed after coming within the State." It does not belong to that class of subjects which are national in their character and admit of but one system of regulation for the whole country, having in view the prevention of unjust discrimina-
18 tion and the preservation of the freedom of transit and transportation from one State to another. Wabash, etc., Ry. Co. *vs.* Illinois, 118 U. S., 557 and cases there cited.

The case of Robbins *vs.* Shelby County Taxing District, 120 U. S., 489, does not conflict with the foregoing views. The license there exacted of foreign drummers was held to be a tax on interstate commerce; it was not a police regulation. Even in that case the stronger reasoning, in our judgment, is with the able opinion of Chief Justice Waite, concurred in by Justices Field and Gray. In Port of Mobile *vs.* Leloup, 76 Ala., 401, we sustained as constitutional an ordinance of the port of Mobile imposing a license tax upon a telegraph company doing business in that city between this and other States, which was interstate commerce. In this we followed as authority the case of Osborne *vs.* Mobile, 16 Wall., 497, in which the United States Supreme Court sustained a similar license on an express company under like circumstances. The same question had been before decided in Southern Express Company *vs.* Mayor, etc., Mobile, 49 Ala., 404. In City of New Orleans *vs.* Eclipse Tow-Boat Co., 33 La. Ann., 647; S. C. 39 Amer. Rep., 279, in like manner a city ordinance exacting a license fee from the owner

of tow-boats running on the Mississippi river to and from
19 the Gulf of Mexico, was held not unconstitutional as a regulation of commerce upon authority of the same decision. In The Amer. Union Tel. Co. *vs.* The Western Union Tel. Co., 67 Ala., 26, we held that the provisions of our Constitution prohibiting foreign corporations from doing business in this State without having at least one known place of business and an authorized agent therein" was a legitimate exercise of the police power, and was not a regulation of commerce as applied to a telegraph company doing business between this and other States.

2. The other objections to the law, based on constitutional grounds, are, in our opinion, not maintainable. It does not confer judicial power on the board appointed by the Governor, nor does it deprive the citizen of his liberty or property without due process of law. The vesting by legislative authority of the power to license various occupations and professions requiring skill in their exercise, or the observance of the law of hygiene, or the like, have never been construed to be obnoxious to these objections. It has been uniformly held that laws providing by accustomed modes for the licensing of physicians, lawyers, pilots, butchers, bakers, liquor dealers, and in fact all trades, professions, and callings, interfere with no
20 natural rights of the citizen secured by our Constitution. Mayor, etc., Mobile *vs.* Zuille, 3 Ala., 137; Dorsey's Case, 7 Port., 295; Cooper *vs.* Schultz, 32 How. Prac. Rep., 107, and authorities cited; Coe *vs.* Schultz, 47 Barb. (N. Y.), 64; The Metropolitan Board of Health *vs.* Heister, 37 N. Y., 661; Reynolds *vs.* Schultz, 34 How. Pr. Rep., 147; People *vs.* The Medical Society of New York, 3 Wend., 426; Metropolitan Board of Excise *vs.* Barrie, 34 N. Y., 627; Barbier *vs.* Connolly, 113 U. S., 27; Soon Hing *vs.* Crowley, 113 U. S., 703; Slaughter-House Cases, 16 Wall., 36. The case of Vick Wo *vs.* Hopkins, 118 U. S., 356, does not, in our opinion, lend any favor to the contention of appellant The municipal ordinance there pronounced invalid vested in the board of supervisors the arbitrary power to license public laundries at their own mere will and pleasure, without regard to discretion in the legal sense of the term and without regard to the fitness or competency of the persons licensed or the propriety of the locality selected for carrying on such business. Properly construed, this case favors the views above expressed by us.

The rulings of the court accord with these views, and the judgment is affirmed.

21 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the supreme court of the State of Alabama, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law and equity of the said State in which decision could be had in the said suit between the State of Alabama and Joseph J. Smith, wherein was drawn

in question the validity of a statute of said State, on the grounds of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of such its validity, wherein the right, privilege, or immunity was claimed under the Constitution of the United States, and the decision was against the right, privilege, or immunity specially set up or claimed under such Constitution, a manifest error hath happened, to the great damage of the said Joseph J. Smith, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein
22 given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this twenty-ninth day of July, in the year of our Lord one thousand eight hundred and eighty-seven.

N. W. TRIMBLE,
Clerk of the Circuit Court of the United States, Fifth Judicial Circuit and Southern District of Alabama.

Allowed July 29th, 1887.

GEO. W. STONE,
Chief Justice Sup. C't of Alabama.

Filed July 29th, 1877.

JOHN W. A. SANFORD, *Clerk.*

23 Supreme Court of the United States.

JOSEPH J. SMITH, Appellant,
vs.
THE STATE OF ALABAMA, Appellee.

Know all men by these presents that we, Joseph J. Smith, Henry Tacon, and Henry Fonde, of the city of Mobile, county of Mobile, and State of Alabama, are held and firmly bound unto the State of Alabama in the sum of two hundred dollars, to be paid to the said State of Alabama; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this twenty-ninth day of July, 1887.

Whereas the above-named Joseph J. Smith has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Alabama:

Now, therefore, if the condition of this obligation is such that if

the above-named Joseph J. Smith shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain
24 in full force and virtue.

JOSEPH J. SMITH. [SEAL.]
HENRY TACON. [SEAL.]
HENRY FONDE. [SEAL.]

Sealed and delivered in the presence of—
RICHARD PRATT,
JOHN D. HOGAN.

Approved July 29th, 1887.

GEO. W. STONE, *C. J.*

Filed July 29th, 1887.

JOHN W. A. SANFORD, *Clerk.*

THE UNITED STATES OF AMERICA, *ss:*

To the State of Alabama, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama, wherein Joseph J. Smith is plaintiff and the State of Alabama is defendant in error, to show cause, if any there be, why a judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

Witness the Honorable George W. Stone, chief justice of the supreme court of the State of Alabama, this the first day of
25 August, A. D. eighteen hundred and eighty-seven.

GEO. W. STONE,
Chief Justice of the Supreme Court of the State of Alabama.

Filed Aug. 1st, 1887.

JOHN W. A. SANFORD, *Clerk.*

I, Thomas Seay, as Governor of the State of Alabama, do hereby accept service of the within notice of appeal taken by Joseph J. Smith, appellant in the case of Joseph J. Smith *vs.* The State of Alabama, to the Supreme Court of the United States and waive any other or further notice of said appeal.

Aug. 8th, 1887.

(Signed) THOS. SEAY, *Governor.*

STATE OF ALABAMA, *Montgomery County:*

I, John W. A. Sanford, clerk of the supreme court of the State of Alabama, do hereby certify that the foregoing pages, numbered from 1 to 25, inclusive, contain a full, true, complete, and perfect transcript of the record and proceedings of the said supreme court
26 in the cause lately pending in said court, wherein Joseph J. Smith was appellant and the State of Alabama was defendant,

and that the writ of error hereunto attached is the original writ issued, allowed, and filed in the office of the clerk of said supreme court, and that the citation hereto attached was issued and return of execution of said citation in said office of the clerk of the said supreme court, and that the appeal bond hereto attached is the original bond approved and filed in said office of the clerk of the said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, at the capitol, in the city of Montgomery, in the State of Alabama, on the 8th day of August, A. D. eighteen hundred and eighty-seven.

[Seal of the Supreme Court of Alabama.]

JOHN W. A. SANFORD,
Clerk of Supreme Court of the State of Alabama.

Endorsed on cover: Alabama supreme court. No. 1009. Joseph J. Smith, plaintiff in error, *vs.* The State of Alabama. Filed August 23d, 1887.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1009.

JOSEPH J. SMITH, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

STATEMENT OF FACTS.

This is a writ of error brought by Joseph J. Smith, to review the judgment of the Supreme Court of Alabama, under proceedings upon a writ of habeas corpus, said Court affirming an order of the Judge of the City Court of Mobile, remanding him to the custody of Dick Roper, sheriff of Mobile County, Alabama, by whom he was held under a mittimus issued by Edwin Tardy, a Justice of the Peace of Mobile County, July 16th, 1887, for the alleged crime of handling, engineering, driving and operating an engine pulling a passenger train upon the Mobile and Ohio Railroad, employed in transporting United States mail, money and perishable freight and passengers, from the city of Mobile and State of Alabama, to Mississippi, Tennessee, Kentucky and other States,

without having obtained a license from the board of Examiners appointed by the Governor of the said State, in accordance with the provisions of an act, entitled "An Act to require locomotive engineers in this State to be examined and licensed by a Board to be appointed by the Governor for that purpose." Approved February 28th, 1887; Acts of Alabama, 1886-87, pp. 100-102,

Upon the trial of the habeas corpus by the Judge of the City Court, the defendant proved the following facts:

That he was a locomotive engineer in the service of the Mobile and Ohio Railroad Company, a corporation owning and operating a railroad, forming a continuous and unbroken line of railway from Mobile, in the State of Alabama, to St. Louis, in the State of Missouri, and as such locomotive engineer, he was engaged in handling, operating and driving a locomotive engine attached to a regular passenger train on the Mobile and Ohio Railroad, said train consisting of a postal car, carrying the United States mail to the States of Mississippi, Tennessee, Kentucky, Illinois and Missouri; a Southern Express car, which had perishable freight, money packages, and other valuable merchandise to Mississippi, Tennessee, Kentucky, Illinois and Missouri; and passenger coaches and a Pullman palace sleeping car, said coaches and Pullman sleeping car were occupied by passengers to be transported by said train to the States of Mississippi, Tennessee, Kentucky, Illinois and Missouri, all of which were drawn by the engine controlled, operated and driven by said locomotive engineer.

That on Saturday, 16th day of July, A. D. 1887, within the county of Mobile and State of Alabama, while the said defendant was handling, operating and driving the

engine pulling said passenger train to which was attached said postal car, in which was contained the United States mail to be carried and delivered to different points located in the States of Mississippi, Tennessee, Kentucky, Illinois and Missouri by said train; the Southern express car loaded with perishable freight, money packages and other valuable merchandise to be carried and delivered to different places in the States of Mississippi, Tennessee, Kentucky, Illinois and Missouri; the passenger coaches and the Pullman palace sleeping car, occupied by passengers to be carried to different points in the States mentioned, he was arrested by a constable of the county of Mobile, State of Alabama, for failing, neglecting and refusing to procure a license in accordance with the act of the Legislature of the State of Alabama, approved February 28th, 1887, That the duties of plaintiff in error as a locomotive engineer in the service of the Mobile and Ohio Railroad Company, required him to operate and handle an engine propelling a train running regularly from the city of Mobile, county of Mobile, and State of Alabama, to the city of Corinth, in the State of Mississippi; sixty miles of which run was in the State of Alabama, and two hundred and sixty-five miles in the State of Mississippi.

That plaintiff in error never as a locomotive engineer in the service of said Mobile and Ohio Railroad Company, handled and operated an engine or an engine propelling a train of cars, when the destination of said engine or engine and train of cars was a point within the State of Alabama, when said engine or engine and train of cars started from a point within the State of Alabama. That the employment of the plaintiff in error as a loco-

motive engineer in the service of the Mobile and Ohio Railroad Company, required him to handle, drive and operate an engine attached to a passenger train loaded with merchandise, carrying the United States mail and transporting passengers as before stated. Said train starts at Mobile, Alabama, and runs through without change of coaches or cars on one continuous trip to St. Louis, Missouri. That the employment of plaintiff in error in the service of the Mobile and Ohio Railroad Company as a locomotive engineer, also requires him to take charge of, handle, drive and operate an engine drawing a passenger train which starts from St. Louis, Missouri, destined to the city of Mobile, in the State of Alabama, said train being loaded with merchandise and carrying the United States mail, and occupied by passengers to be carried to Alabama and other States. That the plaintiff in error takes charge of the engine and train at Corinth, in the State of Mississippi, and handles, drives and operates the same along and over the Mobile and Ohio Railroad, through the States of Mississippi and Alabama to the city of Mobile, in the State of Alabama. That it frequently happens that plaintiff in error is ordered by the proper officers of the Mobile and Ohio Railroad Company to handle, drive and operate an engine propelling a passenger train loaded with merchandise, carrying the United States mail and occupied by passengers to be carried to points in Alabama, Mississippi, Tennessee, Kentucky, Illinois Missouri, said train starting from the city of Mobile, in the State of Alabama, and destined to the city of St. Louis, in the State of Missouri; plaintiff in error as engineer of said train being allowed two lay overs. Said

train passes through the States of Alabama, Mississippi, Tennessee. Kentucky, Illinois and into the State of Missouri. That plaintiff in error has not obtained the license required by the act of the General Assembly of the State of Alabama, approved February 28th, 1887, and that he has not applied to the Board of Examiners or any of its members for the license mentioned in said act, and that plaintiff in error was aware of the fact that more than three months had elapsed at the time of his arrest since the appointment and justification of said Board of Examiners, and that said Board had been duly appointed by the Governor of the State of Alabama, pursuant to the provisions of said act.

ARGUMENT.

The main question presented to this Court for determination is, whether the act of the Legislature of Alabama, approved February 28th, 1887, in so far as it is sought to enforce its provisions against the plaintiff in error, is in harmony with the Constitution of the United States.

An examination of this act, acts of Alabama, 1886-87, pp. 100-102, shows that it is made unlawful for any engineer of any railroad train within the State of Alabama, to drive or operate any train of cars, or engine upon the main line or roadbed of any railroad in the said State, which is used for the transportation of persons passengers or freight, without first undergoing an examination once, and obtaining a license from the Board of Examiners to be appointed by the Governor under the provisions of the act.

Section 2 of the act provides, that before any person shall operate or drive any engine upon the main line or roadbed of any railroad within the State of Alabama, used for the transportation of persons or freight, he shall apply to the Board of Examiners provided for in said act, and be examined by said Board or by two or more of the members thereof, in practical mechanics, and concerning his knowledge of operating a locomotive engine, and his competency as an engineer. Section 3 of the act provides that if the applicant is found competent, he shall upon payment of five dollars, receive a license, which shall be signed by each member of the Board, and which shall set forth the fact that said engineer has been duly examined as required by law, and is authorized to engage as an engineer on any of the railroads in the State of Alabama.

Section 6 of the act makes it the duty of the Governor after his approval of the act, to appoint and commission five skilled mechanics, one of whom shall reside in Birmingham, one in Montgomery, one in Mobile, one in Selma and one in Eufaula, who shall constitute a Board of Examiners for locomotive engineers Said section 6 makes it the duty of the said Board to examine locomotive engineers, issue licenses, hear causes of complaint, revoke or cancel licenses, and perform such duties as are provided in the act. Section 6 also provides, that any one of the said Board shall have authority to examine applicants for licenses, and if the applicant is found competent, to issue license to him; provided further, that for every examination provided for in the act, the Board or member thereof making the examination shall be entitled to five dollars, to be paid by the applicant.

Section 7 of the act prescribes that all engineers employed in running or operating engines upon railroads in the State of Alabama, shall have three months after the appointment of the Board, within which to be examined and obtain license.

Section 8 of the act makes any engineer violating the provisions of said act guilty of a misdemeanor, and upon conviction, provides that he shall be fined not less than fifty nor more than five hundred dollars, and may also be sentenced to hard labor for the county for not more than six months.

We insist that no State has the power to pass any law affecting inter-state commerce where the regulation of such commerce requires a uniform rule, or where the subject is national and should admit of but one form or plan of regulation. This Court has repeatedly decided that the power to regulate commerce with foreign nations, and among the several States, is exclusively vested in Congress. Gibbons vs. Ogden, 9 Wheaton, 1; Passenger Cases, 7 Howard, 283; County of Mobile vs. Kimball, 102 U. S., 691; Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196; Fargo vs. Michigan, 121 U. S. 231; Western Union Telegraph Co. vs. Pendleton, 122 U. S., 347.

The plaintiff in error while operating an engine engaged in the business of inter-state commerce is as much an instrument of such commerce as the locomotive or cars in which the merchandise or persons are transported. This Court has held that the transportation of passengers and freight from one State to another is inter-state commerce. Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196. The subjection of the plaintiff in error under

the facts of this case to examination and license and the payment of a fee before he is allowed to engage in the business of inter-state commerce, we insist, is not a regulation local or limited in its nature, but one of general application, and if it be held that the State of Alabama can impose such a system of regulation upon inter-state commerce, then every State in the Union could likewise devise and impose an independent system in accordance with its own policy and requirements, and it might so happen that each State would have a different system of laws prescribing the qualifications and competency of a locomotive engineer.

Congress by an Act approved February 4th, 1887. twenty-four days before the passage and approval of the Act of Alabama in question, legislated upon the whole subject of inter-state commerce carried on by the railroads of this country, and no provision is made therein for the examination and license of locomotive engineers, engaged in the business of inter-state commerce, and this Court has held that the non-exercise of the power in respect to the regulation of commerce between the States, is equivalent to a declaration that such commerce shall be free and untramelled.

Section 1 of the Inter-State Commerce Act declares,

"The term railroad as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the roads in use by any corporation, operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term *transportation shall include all instrumentalities of shipment or carriage.*"

From this it conclusively appears that Congress has expressly legislated upon this subject. We insist that this Court had so construed the Constitution as appears by the following authorities before the enactment of this

legislation by Congress. Welton vs. Missouri, 91 U. S., 275; Brown vs. Houston, 114 U. S., 622; Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196; Pickard vs. Pullman Southern Car Co., 117 U. S., 34; Wabash, St. Louis & Pacific Ry. Company vs. Illinois, 118 U. S., 557; Walling vs. Michigan, 116 U. S., 446; Corson vs. Maryland, 120 U. S., 502; Hall vs. DeCuir, 95 U. S., 485; Railroad Company vs. Husen, 95 U. S., 465.

We further insist that this Act of the State of Alabama when attempted to be enforced against plaintiff in error, is not such a local regulation in its nature or operation as can be prescribed by the State. The States have no power to prescribe the qualifications of persons who are engaged in inter-state commerce.

This Court has frequently decided that the business must be open and free to all persons, unless restricted by Congressional legislation. Webber vs. Virginia, 103 U. S., 344; Henderson vs. Mayor of New York, 92 U. S., 559. People vs. Compagnie Generale, 107 U. S., 59.

It would seem clear that it is not competent in view of the decisions of this Court for a State to say, that no person shall operate an engine propelling a train loaded with merchandise and occupied by passengers running from that State into another, or from another State into it, without previously being licensed to do so by such State. If it can do so as to locomotive engineers, it can do so as to firemen, conductors, brakemen, porters, etc. If the State can lawfully require these persons to be licensed before engaging in the business of inter-state transportation carried on through it, it is equivalent to a declaration that such State can forbid any person from engaging in inter-state commerce within its boundaries

without first obtaining the authorization of such State. Such action, would seem to be clearly at variance with the commercial clause of the Constitution of the United States. The general rule deducible from the decisions of this Court concerning the constitutional immunity, is, that a State will not be permitted to impose conditions which will amount to a regulation of inter-state commerce. It has been held by this Court that foreign corporations carrying on such business cannot be excluded from a State, nor can they be required to conform to any regulation by the State as a condition precedent to the carrying on of such inter-state commerce. Pensacola Telegraph Co. vs. Western Union Telegraph Co., 96 U. S., 1; Cooper Manufacturing Co. vs. Fergurson, 113 U. S., 727; Case of the State Freight State Tax, 15 Wallace, 232. This Court held in "The Montello," 11 Wall., 411, that, at that time Congress had prescribed no rule governing commerce between the States, except so far as it was conducted in vessels on navigable waters of the United States. We contend, that under the Act of Congress, entitled "An Act to regulate Commerce," approved February 4th, 1887, Congress exercised to the extent it deemed necessary the power to regulate commerce with foreign nations and among the several States, and has left it free to all persons to engage in it, and no State can alter, annul or abridge that freedom. If the State of Alabama can prescribe that an engineer before he can engage in the business of inter-state commerce as appears from the facts of this case, must secure a license from the State, then, the other thirty-nine States of the Union can do likewise, and a locomotive engineer seeking to engage in the business of operating an engine carrying freight

and passengers from one State to another would be compelled to obtain forty different licenses and might have to qualify himself to meet forty different sets of requirements.

This Court held in the case of Pensacola Telegraph Co. vs. Western Union Telegraph Co., 96 U. S., 1, that it was not only the right, but the duty of Congress to take care that intercourse among the States is not obstructed by State legislation. We contend that commerce among the several States could not be maintained under, or at least, could not submit to such obstruction as the procurement by an engineer of a license from forty different States before he would be authorized to engage in the business of inter-state commerce. In Welton vs. Missouri, 91 U. S., 275, it is held that the power to regulate embraces all the instruments by which such commerce may be conducted; and that portion of commerce with foreign countries and between the several States which consists in the transportation and exchange of commodities is national, and admits and requires uniformity of regulation. We contend that the enforcement of this Act of the State of Alabama against the locomotive engineers in the service of the different railroad companies, driving engines as the plaintiff in error was engaged when arrested, would be clearly in conflict with the settled decisions of this Court, and the recent Act of Congress regulating commerce among the States.

This Court said in the case of The State Freight Tax, 15 Wallace, at page 277:

"Doubtless a State may regulate its internal commerce as it pleases. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the State."

In Fargo vs. Michigan, 121 U. S., 243, Mr. Justice Miller speaking for the Court, said:

"The proposition that the States can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of said corporations, has often been set up as a defence to the allegation that taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the States or with foreign nations, the constitutional provisions cannot thereby be evaded, nor can the States, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself inter-state commerce, acquire the right to regulate that commerce. *either by taxation or in any other way.*"

The Supreme Court of Alabama in its opinion maintains the constitutionality of the Act of the Legislature in question, upon the ground that the Act affected commerce between the States only incidentally, and was no more of a regulation than the laws licensing pilots or vessels engaged in such commerce.

The Court said: (Record page 7.)

"The laws of the several States have undertaken not only to license pilots in such cases, but have gone so far as to regulate the whole subject of pilotage and pilots, fixing their qualifications, employment, and pay, including the tender of service, and, on refusal to employ authorizing the recovery of half pay. These laws have been sustained, not on the ground that Congress had recognised them as valid, for it is clear that no such recognition could confer any constitutional power on the States which they did not already possess, but upon the ground that they were necessary police regulations, or if regulations of commerce in a certain sense, they were local regulations, having in view the public safety, and of such a nature as to be permissible until Congress itself undertook to exercise the same power by legislating on the subject."

The supreme Court of Alabama seems to have overlooked the decision and reasoning of this Court in Passenger Cases, 7 Howard, 283-578. where it is said:

"Pilot laws, enacted by different States, have been referred to as commercial regulations. That these laws do regulate commerce, to a certain extent, is admitted; but from what authority do they derive

their force? certainly, not from the States. By the 4th section of the Act of the 7th of August, 1789, (1 Stat. at Large, 54), it is provided: "that all pilots in bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provisions shall be made by Congress." These State laws, by adoption, are the laws of Congress, and as such, effect is given to them. And laws of the States which regulate the practice of their Courts are adopted by Congress to regulate the practice of the federal courts. But these laws, so far as they are adopted, are as much the laws of the United States, and it has often been so held, as if they had been specifically enacted by Congress. A repeal of them by the States, unless future changes in the Acts be also adopted, does not affect their force in regard to federal action. In the above instances it has been deemed proper for Congress to legislate, by adopting the laws of the States. And it is not doubted that this has been found convenient to the public service. Pilot laws were enforced in every State on the seaboard when the Constitution was adopted; and on the introduction of a new system, it was prudent to preserve, as far as practicable, the modes of proceedings with which the people of the different States were familiar. In regard to pilots, it was not essential that the laws should be uniform,—their duties could be best regulated by an authority acquainted with the local circumstances under which they were performed; and the fact that the same system is continued, shows that the public interest has required no change."

In speaking of the pilot laws of the several States, Mr. Justice Story, said:

"They have been *adopted* by Congress and without question are controllable by it." 2d Story's Constitution, Section 1071.

Chief Justice Marshall, in Gibbons vs. Ogden, said:

"When the government of the Union was brought into existence, it found the system for the regulation of pilots in force in several States; the Act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress."

9 Wheaton, 1-207.

It is clearly shown from the principles deducible from these cases that the only authority of the States in the matter of pilotage is derived from the fact that such State laws are expressly enacted and adopted by Congress.

We contend that the laws regulating the qualifications and competency of locomotive engineers engaged in interstate commerce should be uniform, and that there is nothing in the duties of a locomotive engineer which require that they be regulated by an authority acquainted with the local circumstances under which they are performed. Railroads running from one State to another are well defined fixtures, and there is no shifting of the currents and sands of the sea, as in the case of the navigation of vessels by pilots in the bays, inlets, rivers, harbors and ports of the United States.

It is shown from the evidence in this case, that the plaintiff in error is engaged *solely* in handling, operating and driving a locomotive engine pulling a train of cars running from one State to another. (Record page 5.)

In the Passenger Cases, it is said:

"The officers and crew of a vessel are as much an instrument of commerce as the ship from which it seems clear that an engineer operating and driving an engine is as much an instrument of commerce as the engine and train of cars."

And how can it be said that this Act of the Legislature of Alabama, is not a regulation of commerce? No one can well doubt that if the same Act had been passed by Congress it would have been a regulation of commerce, and in that way and that only would it have been a constitutional act of Congress.

It is said in the case of Gibbons vs. Ogden, 9 Wheaton, 189-197;

"Commerce is traffic; but it is something more. It is intercourse. It prescribes the commercial intercourse between nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

And again:

"It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United

States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. * * * * In regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. * * * * * If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exist within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State. * * * * The power of Congress comprehends navigation within the limits of every State within the Union, so far as that navigation may be connected with commerce with foreign nations, or among the several States * * * * It is the power to regulate, that is, to prescribe the rule by which commerce is governed."

So far as this Act is sought to be enforced against engineers operating trains carrying freight or passengers from Alabama into another State, or from any given State into Alabama, it would seem clear that it must have the effect of regulating commerce among the States; and that it is, so far as such engineers are concerned, stricken down by the Act of Congress to regulate commerce, approved February 4th, 1887.

Congress has not only acted on this subject, but has confined its action to that feature of commerce with foreign nations and among the several States embraced in transportation alone; and it must be conclusively presumed that it enacted all regulations which were deemed by it requisite or necessary touching the transportation of such commerce.

Chancellor Kent in his great work, reviews most intelligently and ably the decisions of this Court upon the commerce clause of the Constitution up to the time he wrote, and the doctrine laid down by him as deduced from its decisions has never been departed from by this Court, but has again and again been reaffirmed. He says:

"The doctrine of the Court was, that when Congress exercised powers upon any given subject, the States could not enter upon the same ground, and provide for the same object. The will of Congress may be discovered as well as by what they have not declared, as by what they have expressed. Two distinct wills cannot at the same time be exercised, in relation to the same subject effectually, and at the same time be compatible with each other."

1st Kent's Commentaries, p. 389. Again he says:

"But the question was, whether the State Legislature had any concurrent power remaining after Congress had provided in its discretion for the case. The conclusion was, that when once the Legislature of the Union has exercised its powers on a given subject, the State power over that same subject, which before was concurrent was by that exercise prohibited, and this was the opinion of the Court."

1st Ib., page 391.

The doctrine as announced by Chancellor Kent is reaffirmed by this Court in the case of Robbins vs Taxing District of Shelby County, 120 U. S., 489. In that case the Court said;

"In a word, it may be said that, in the matter of inter-state commerce, the United States are but one country, and are and must be subject to one system of regulations,and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject."

In the same opinion this Court said:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Inter-state commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the State."

While the Act of Alabama in question may be constitutional and valid against locomotive engineers employed in transporting domestic commerce, or that which is wholly within the State of Alabama, it would seem to be plain under the decisions of this Court that it cannot be extended and applied to locomotive engineers engaged *solely* in operating trains engaged in the transportation

of inter-state commerce. If it becomes necessary in the judgment of Congress that locomotive engineers engaged in inter-state commerce should be examined and licensed, Congress, it is presumed, will enact appropriate legislation to effect the same. On this point, this Court said, in Robbins vs. Taxing District of Shelby County:

"If the selling of goods by sample and the employment of drummers for that purpose injuriously affects the *local* interests of the State, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulation should be based on a uniform system applicable to the whole country; and not left to the varied, discordant, or retaliatory enactments of forty different States. The confusion into which the commerce of the country would be thrown by being subject to such legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation. To say that the tax, if invalid as against drummers of other States, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because, the State is not bound to tax its own drummers; and if it does so, whilst having no power to tax those of other States; it acts of its own free will, and it is itself the author of such discrimination."

Mr. Justice Miller, in the case of Fargo vs. Michigan, 121 U. S., 247, speaking for the Court and reviewing the effect of the decision in the Wabash &c. Railway Co. vs. Illinois, 118 U. S., 557, said:

"This Court held in that case that no statute of a State in regard to the transportation of goods over railroads within its borders, which was a part of a continuous voyage to or from points outside of that State, and thus properly inter-state commerce, could regulate the compensation to be paid for such transportation; that the carriage of passengers or freight between different points is commerce, and except where that is wholly and exclusively within the limits of a State, it is not subject in its *material features* to be regulated by State legislation."

For the Legislature to say what shall be the qualifications of a locomotive engineer and demand that he take out a license from the State authorities before he shall engage in the business of inter-state commerce; and to

provide, as is contained in section 5 of the Act, when that license shall be forfeited or revoked, is, we insist, a material feature in the regulation of inter-state commerce. If this Act is constitutional, then, if an engineer in the service of the Mobile and Ohio Railroad Co. in operating his train south-bound from St. Louis, Missouri, to Mobile, Ala., should become sick or fall dead in Mississippi, just before passing the imaginary boundary line between that State and Alabama; his experienced fireman—perhaps just as capable an engineer as he—could not run the train on through to the first station in Alabama without committing a crime. If Mississippi adopted, as it may as rightfully do as Alabama, a similar statute, the train, perhaps miles from any telegraph station, must remain where it is until a messenger can be sent, and an engineer can be summoned, duly authorized by the two States to operate a train from one State into the other State, or if Mississippi has no such statute marring its legislation, then the train must remain where it is, for it cannot be run back to a siding in Mississippi, lest it collide with some following train—until a messenger can be sent and an engineer brought from Alabama, or elsewhere, duly authorized by that sovereign State to operate a train engaged in inter-state commerce over its soil. Perishable freight, express remittances to meet important commercial contracts about maturing, passengers hastening to meet urgent business engagements, the United States mails, the sick and the weary must all wait until the constituted authority of the State of Alabama shall arrive. It were unreasonable to expect an engineer not licensed by Alabama, however skillful, to operate a train of cars beyond the imaginary line at the risk of being fined five

hundred dollars and sentenced to six months hard labor for the county of Mobile, State of Alabama, as provided in section 8 of the Act. If all the engineers in the service of the different railroads which run through the State of Alabama, and who are engaged in inter-state transportation, and who had been licensed by the State, should leave the service of the different companies, or strike, their places could not be supplied without authority from the State of Alabama, which might not readily be obtained, and inter-state commerce must stand still. The power to license carries with it the power to limit the number of licenses. If Alabama has the power to license persons to carry on inter-state commerce, it has the power to say that not exceeding a certain number shall engage in that business within the State, and might thus so cripple inter-state carriers as to make it impossible for them to do their legitimate business.

As to the license tax decisions of this Court relied upon by the Supreme Court of Alabama in its opinion construing this act, (record page 9) they are not analgous to this case, for the reason that they do not affect inter-state commerce at all; the property taxed having ceased to be a subject of inter-state commerce and having become intermingled with the general mass of property in the State. This Court held in Brown vs, Maryland, 12 Wheaton, 419, that a statute requiring importers of foreign goods to pay for and take out a license from the State, before selling in their original packages goods imported into the United States, was unconstitutional and void as repugnant to the commercial clause of the constitution.

The act of the State of Alabama requiring locomotive

engineers engaged *solely* in inter-state transportation to pay for and take out a license before engaging in the business of inter-state commerce is equally unconstitutional and void. LaFayette Insurance Co. vs. French, 18 Howard, 404; Ducat vs. Chicago, 10 Wallace, 410-415; Insurance Co. vs. Morse, 20 Wallace, 445-456; St. Clair vs. Cox, 106 U. S., 350-356; Philadelphia Fire Ass'n vs. New York, 119 U. S., 110-120; Barron vs. Burnside, 121 U. S., 200. See also Welton vs. Missouri, 91 U. S., 275; Cook vs. Pennsylvania, 97 U. S., 566; Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 96; Fargo vs. Michigan, 121 U. S., 244; Robbins vs. Taxing District of Shelby County, 120 U. S., 489.

In Pullman Southern Car Co. vs. Gains, 3 Cooper's (Tenn.) Chancery, 587, that Court held that a privilege tax upon the operating and using of sleeping cars on railroads within the State, not owned by the railroads, was constitutional and valid although the owner was a foreign corporation, and the cars might be used for the accommodation of passengers traveling through the State. That case, however, was overruled by this Court in Pickard vs. Pullman Southern Car Co., 117 U. S., 34.

The Supreme Court of Alabama relies upon the case of the Port of Mobile vs. LeLoup, 76 Ala., 401, in which it sustained as constitutional the ordinance of the Port of Mobile imposing a license tax upon a Telegraph Company doing business between this and other States.

The bearing of this case would seem to be, that the exercise of the power by Congress upon any particular needed phase of regulation, while it might over-ride and exclude existing or future legislation by the State upon that particular phase of regulation, would not prevent

the exercise of the police power by the State upon another needed phase of regulation, and that it would be a judicial question in each instance, whether the regulation attempted by the State was already covered by the Federal statutes. This is certainly not the general view of the question maintained by this Court, and is not in accordance with the position assumed by Mr. Justice Matthews, in Cooper Manufacturing Co. vs. Ferguson, 113 U. S., 737. He there says:

"That it was commerce, and to prohibit it except upon conditions is to regulate commerce between Colorado and Ohio which is within the exclusive province of Congress."

And in Telegraph Co. vs. Texas, 105 U. S., 460, it was expressly held that a tax on telegraph messages transmitted beyond the State by a telegraph company which had accepted the provisions of title 65 of the federal statutes relating to Telegraph Companies, is unconstitutional

The Supreme Court of Alabama maintains that the Act of the Legislature is valid, being a proper exercise of the police power of the State. We do not think there is a reported decision which supports, to such an extent, the police power of a State.

In Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196, Mr. Justice Field, at page 215, quotes with approval from Cooley's Constitutional Limitations, as follows:

"It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions if it shall be deemed advisable, and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution."

Cooley's Constitutional Limitations, 732.

Congress has exercised its police power in the matter of the transportation by railroad companies within the United States, whose roads form a part of a continuous line from one State to another, of cattle, sheep, swine or other animals, and provides that they shall not be kept in cars for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes, and has prescribed penalties for neglect to comply with this provision, and the procedure by which the penalties may be recovered. Revised statutes of the United States, 1878, §§4386, 4387, 4388, 4389, 4390.

In Western Union Telegraph Co. vs. Pendleton, 122 U. S., 347, Mr. Justice Field for the Court said:

"The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulation, where such uniformity is practicable against conflicting State legislation."

To adapt the language of Mr. Justice Field in that opinion to the case at bar: 'Such conflicting legislation would inevitably follow with reference to railroad communication between citizens of different States who are engineers, and actively engaged in inter-state commerce, if each State was vested with the power to control them while passing through its territory.'

In this connection we beg to call the attention of the Court to the language of Mr. Justice Miller, in Henderson et al. vs. Mayor of New York et al., 92 U. S., 272, speaking of the necessity for uniform regulations in respect to commerce, and as to the authority of the case of Cooley vs. Board of Wardens, 12 Howard, 299, he says:

"It is said, however, that, under the decisions of this Court, there

is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the State and its legislative be valid so long as it interferes with no Act of Congress, or treaty of the United States. Such a proposition is supported by the opinions of several of the Judges in the Passenger Cases; by the decisions of this Court in Cooley vs. The Board of Wardens, 12 Howard, 299; and by the cases of Crandall vs. Nevada, 6th Wallace, 35, and Gilman vs. Philadelphia, 3 Wallace, 713. But this doctrine has always been controverted in this Court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree that under the commerce clause of the Constitution, or within its compass, there are powers, which from their nature are exclusive in Congress; and, in the case of Cooley vs. The Board of Wardens, it was said, that whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. A regulation which imposes onerous, perhaps impossible conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character."

The Supreme Court of Alabama referring to the case of Robbins vs. Taxing District of Shelby County, 120 U. S., 489, says:

"The license there exacted of foreign drummers was held to be a tax on inter-state commerce; it was not a police regulation."

This we contend is no answer to the argument, for the reason that if the plaintiff in error was actively engaged, as the evidence shows he was, (Record page 5) in inter-state commerce he could not be taxed at all. Robbins vs. Shelby Taxing District, 120 U. S., 497; and if it was a needed police regulation, then Congress was the only power having the authority to enact it. Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196; Cooley's Constitutional Limitations, 5th Ed., page 724.

And a moments thought upon this question, it seems, would be convincing to the mind that this case, to use the language of Mr. Justice Bradley in the Robbins case,

"is one of great importance to the people of the United States, both as it respects their business interests and their constitutional rights."

* * * * "In a word, it may be said that in the matter

of inter-state commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems."

And that there is nothing in this case requiring peculiar regulations with reference to special and peculiar circumstances.

This act of the Legislature of Alabama affects the immense and increasing inter-state communication of the people, and we think that if it is desirable that locomotive engineers engaged in inter-state commerce should be examined and licensed, that an act to effectuate it should be passed by Congress, uniform in its operation and applicable to the whole country.

To illustrate the practical enforcement of the act in cases similar to the one here presented, we will suppose that the State of Mississippi passed a law requiring locomotive engineers running from Mobile, Alabama, to Corinth, Mississippi, to go before an examing board and obtain license. We will further suppose that an engineer engaged in operating a train between Mobile, Alabama, and Corinth, Mississippi, passed the examination in Alabama, and secured the requisite license, but the Mississippi Board of Examiners refused to grant such engineer a license, can any one successfully deny, that such action would not obstruct and interfere with "commerce among the States."

All of which is respectfully submitted.

E. L. RUSSELL,
B. B. BOONE,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM 1887.

No. 1009.

JOSEPH J. SMITH, PLAINTIFF IN ERROR,

VS.

THE STATE OF ALABAMA.

MOTION TO ADVANCE THE CAUSE.

And now comes the Plaintiff in error, Joseph J. Smith, and shows to this Honorable Court that he has sued out a writ of error to the Supreme Court of the State of Alabama returnable at the October term A. D. 1887, of this Court; that the record of the proceedings in said cause were filed in this Court August 23d, 1887. That notice of the issuance of said writ and a citation to the State of Alabama to appear at the October term of this Honorable Court, and defend the same, was duly served upon the Governor of said State as provided by statute, on the 8th day of August, A. D. 1887, as appears on page 11 of the printed record now on file.

Your petitioner respectfully represents that the General Assembly of the State of Alabama passed an act approved February 28th, 1887, Acts of Alabama, 1886-'87 entitled "An Act to require locomotive engineers in this State to be examined and licensed by a Board to be appointed by the Governor for that purpose."

That he is a locomotive engineer employed in the service of the Mobile and Ohio Railroad Company, a corporation owning and operating a line of railway from the City of Mobile in the State of Alabama, to the City of St. Louis in the State of Missouri; and that his duties require him to handle, operate and drive a locomotive engine engaged in propelling passenger coaches, express cars and a postal car of the United States, from the said city of Mobile, through the States of Alabama, Mississippi, Tennessee, Kentucky, Illinois, and to the city of St. Louis, in the State of Missouri, and vice versa. That on Saturday, the 16th day of July, 1887, within the County of Mobile and State of Alabama, while he was handling and operating an engine upon a portion of the main line of the Mobile and Ohio Railroad, lying and being within the said County and State, and which said engine was drawing a United States postal car, a Southern Express car, passenger coaches and a Pullman palace sleeping car; (the said postal car, passenger coaches, sleeping car and express car, carrying the United States Mail, and passengers and merchandise destined to various points within the States of Mississippi, Tennessee, Kentucky, Illinois, Missouri, and other States;) he was arrested by a constable of the County of Mobile, State of Alabama, for failing, neglecting and refusing to procure a license in accordance with said act of the Legislature of the State of Alabama. That he was taken before one Edwin Tardy, a Justice of the Peace in and for the County of Mobile, State of Alabama, who after hearing the cause, committed your petitioner to jail in the said County until the next session of the City Court of Mobile, to be and appear before said Court, on the first Tuesday of November, A. D. 1887, to answer the charge of having violated the provisions of the act of the General Assembly of the State of Alabama, hereinbefore mentioned. (Record page 3.) That thereupon, your petitioner sued out a writ of habeas corpus returnable before

the Honorable Oliver J. Semmes, Judge of the City Court of Mobile, July 18th, A. D. 1887. Your petitioner claiming in his petition for said writ and at the hearing upon the return of the same, that the act of the Legislature of the State of Alabama hereinbefore specifically designated was a regulation of "commerce among the States" in so far as it was attempted to enforce the provisions thereof upon and against your petitioner. Your petitioner averring that it was beyond the jurisdiction and power of the State of Alabama to enforce said act against and upon your petitioner, and that inasmuch as your petitioner was engaged in "commerce among the States," that the attempt to compel him to comply with the provisions of the said act, and enforce the penalties thereof against him for his refusal to comply therewith, was an usurpation of power not confided to the State of Alabama or its authorities, and was in violation of the Constitution of the United States, Art. 1, Sec. 8, paragraph 3. (Record pp. 3-4.)

Your petitioner further shows, that upon the hearing of the writ he was remanded to the custody of the sheriff of Mobile County by the Judge of the City Court of Mobile. (Record page 6.)

Your petitioner further shows that he thereupon perfected an appeal from the order of the Honorable Oliver J. Semmes, Judge of the City Court of Mobile, to the Supreme Court of Alabama, and that said Court affirmed the order of Judge Semmes, remanding him to the custody of the sheriff of the County of Mobile, on July 27th, 1887. (Record page 7.)

Your petitioner shows that he is now in the custody of the Sheriff of the County of Mobile, State of Alabama, and restrained of his liberty, on account of his failure and refusal to comply with the act of the General Assembly of the State of Alabama, approved February 28th, 1887. Acts of Alabama, 1886-'87, pp. 100-102.

Your petitioner alleges that the act of the Legislature of Alabama herein referred to, is void in so far as it is sought to be enforced against him, being a regulation of "commerce among the States," and an interference with the exclusive power and authority of Congress, as established by the Constitution of the United States and the acts of Congress passed in pursuance thereof.

Petitioner alleges that said act is highly penal in its character, and that any engineer violating any of its provisions is made guilty of a misdemeanor, and upon conviction, shall be fined not less than fifty nor more than five hundred dollars, and may also be sentenced to hard labor for the County for not more than six months.

Petitioner alleges that the record shows, that in said cause there was drawn in question the validity of a statute of the State of Alabama, on the ground of its being repugnant to the Constitution and laws of the United States, and that the decision of the highest Court of law and equity within the State of Alabama was in favor of the validity of said statute, wherein a right, privilege or immunity was claimed under the Constitution and laws of the United States, and the decision was against the right, privilege or immunity specially set up or claimed under such Constitution and laws.

Your petitioner therefore prays that this Honorable Court will advance his cause on its docket, it being a criminal case, and upon a writ of error to revise the judgment of the Supreme Court of Alabama, and set an early day at which the same may be heard.

This application for the advancement of the cause is made in accordance with section 710 of the Revised Statutes of the United States, 1878.

All of which is respectfully submitted.

E. L. RUSSELL and
B. B. BOONE,
Attorneys for Plaintiff in error.

To require locomotive engineers in this State to be examined and licensed by a board to be appointed by the Governor for that purpose.

Unlawful to serve without license.

SECTION 1. *Be it enacted by the General Assembly of Alabama,* That it shall be unlawful for the engineer of any railroad train in this State to drive or operate or engineer any train of cars or engine upon the main line or road bed of any railroad in this State which is used for the transportation of persons, passengers or freight, without first undergoing an examination once, obtaining a license as hereinafter provided.

SEC. 2. *Be it further enacted,* That before any locomotive engineer shall operate or drive an engine upon the main line or roadbed of any railroad in this State used for the transportation of persons or freight, he shall apply to the board of examiners hereinafter provided for in this act, and be examined by said board or by two or more members thereof, in practical mechanics, and concerning his knowledge of operating a locomotive engine and his competency as an engineer.

License granted.

SEC. 3. *Be it further enacted,* That upon the examination of any engineer as provided in this act, if the applicant is found competent, he shall upon payment of five dollars, receive a license, which shall be signed by each member of the board, and which shall set fourth the fact that the said engineer has been duly examined as required by law and is authorized to engage as an engineer on any of the railroads in this State.

Character of applicant.

SEC. 4. *Be it further enacted,* That in addition to the examination provided for in section two (2), it shall be the duty of said board of examiners, before issuing the license provided for in this act, to enquire into the character and habits of all engineers applying for license; and in no case shall a license be issued, if the applicant is found to be of reckless or intemperate habits.

How license forfeited.

SEC. 5. *Be it further enacted,* That any engineer, who, after procuring a license as provided in this act, shall at any time be guilty of any act of recklessness, carelessness or negligence while running an engine, by which any damage to persons or property is done; or who

shall within six hours before, or during the time he is engaged in running an engine, be in a state of intoxication, shall forfeit his license, with all the rights and privileges acquired by it, indefinitely or for a stated period, as the board may determine after notifying such engineer to appear before the board, and enquiring into his act or conduct. It shall be the duty of the board to determine whether the engineer is unfit or incompetent by reason of any act, or habit unknown at the time of his examination, or acquired or formed subsequent to it, and if it is made to appear that he is unfit or incompetent from any cause, the board shall revoke or cancel his license and shall notify every railroad in this State of the action of the board.

Revocation of license.

Board appointed by Governor.

SEC. 6. *Be it further enacted*, That it shall be the duty of the Governor, as soon after the approval of this act as practicable, to appoint and commission five skilled mechanics, one of whom shall reside in Birmingham, one in Montgomery, one in Mobile, one in Selma, and one in Eufaula, who shall constitute a board of examiners for locomotive engineers. It shall be the duty of said board to examine locomotive engineers, issue licenses, hear causes of complaint, revoke or cancel licenses, and perform such duties as are provided in this act: *Provided*, that any one of said board shall have authority to examine applicants for licenses, and if the applicant is found competent, to issue license to him; *Provided further*, that for every examination provided in this act, the board or member thereof making the examination shall be entitled to five dollars, to be paid by the applicant.

Fees.

Penalties.

SEC. 7. *Be it further enacted*, That all engineers now employed in running or operating engines upon railroads in this State, shall have three months after the appointment of the board herein provided, within which to be examined and to obtain license.

SEC. 8. *Be it further enacted*, That any engineer violating the provisions of this act, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than fifty, nor more than five hundred dollars, and may also be sentenced to hard labor for the county for not more than six months.

Approved February 28, 1887.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1009.

JOSEPH J. SMITH, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

BRIEF IN SUPPORT OF MOTION TO ADVANCE.

The facts of this case are fully set forth in the motion which has been filed in this case by the Plaintiff in Error and joined in by the State of Alabama through its Attorney General, praying that this Court will advance the cause upon its docket. The record (page 5) shows that the plaintiff in error was operating a locomotive engine propelling a train on the Mobile and Ohio Railroad engaged in inter-state transportation, and running from Mobile, Alabama, to St. Louis, Missouri, on the 16th day of July, 1887, and was arrested for vio-

lating an Act of Alabama and was sent to jail by a magistrate of Mobile County upon the trial of the cause. (Record page 1.) Plaintiff in error thereupon sued out a writ of habeas corpus returnable before Hon. Oliver J. Semmes, Judge of the City Court of Mobile, and at the hearing upon the return of the writ, claimed that the Act under which he was committed to jail (a copy of said Act is appended to the motion on file) was in violation of the Constitution of the United States, article 1, section 8, paragraph 3.

Judge Semmes held that the Act of Alabama was not in conflict with the Constitution of the United States and remanded the prisoner to jail. An appeal was taken to the Supreme Court of Alabama where the order of Judge Semmes was affirmed. (Record page 7.) It appears upon the face of the record that plaintiff in error claimed that the Act of Alabama under which he was convicted was in conflict with the Constitution of the United States, and that the decision of the Supreme Court of Alabama was in favor of its validity. The question of the constitutionality of the Act was necessarily involved in the case, and the Supreme Court of Alabama expressly decided it against the plaintiff in error. (Record page 7.) Hence it follows that this Court has undoubted jurisdiction. Cockroft vs. Vose, 14 Wallace,

5; Railroad Company vs. Rock, 4 Wallace, 177; Parmelee vs. Lawrence, 11 Wallace, 36.

The facts of this case as appears from the record and the motion, bring it clearly within the terms of section 710 of the Revised Statutes of the United States, authorizing the Court to give precedence to criminal cases upon writs of error from a State Court. The cause is presented to the Court upon habeas corpus proceedings, which show that the plaintiff in error is now in jail, and is analagous to the case of Barron vs. Burnside, advanced and decided by the Court at the last term and reported in 121 U. S., 186.

All of which is respectfully submitted.

E. L. RUSSELL,
Attorney for Plaintiff in Error.

E. M. WATSON,
of Counsel.

No. 59.] AN ACT [H. B. 467.

To require locomotive engineers in this State to be examined and licensed by a board to be appointed by the Governor for that purpose.

Unlawful to serve without license.

SECTION 1. *Be it enacted by the General Assembly of Alabama*, That it shall be unlawful for the engineer of any railroad train in this State to drive or operate or engineer any train of cars or engine upon the main line or road bed of any railroad in this State which is used for the transportation of persons, passengers or freight, without first undergoing an examination once, obtaining a license as hereinafter provided.

SEC. 2. *Be it further enacted*, That before any locomotive engineer shall operate or drive an engine upon the main line or road bed of any railroad in this State used for the transportation of persons or freight, he shall apply to the board of examiners hereinafter provided for in this act, and be examined by said board or by two or more members thereof, in practical mechanics, and concerning his knowledge of operating a locomotive engine and his competency as an engineer.

License granted.

SEC. 3. *Be it further enacted*, That upon the examination of any engineer as provided in this act, if the applicant is found competent, he shall, upon payment of five dollars, receive a license, which shall be signed by each member of the board, and which shall set forth the fact that the said engineer has been duly examined as required by law and is authorized to engage as an engineer on any of the railroads in this State.

Character of applicant.

SEC. 4. *Be it further enacted*, That in addition to the examination provided for in section two (2), it shall be the duty of said board of examiners, before issuing the license provided for in this act, to enquire into the character and habits of all engineers applying for license; and in no case shall a license be issued, if the applicant is found to be of reckless or intemperate habits.

How license forfeited.

SEC. 5. *Be it further enacted*, That any engineer, who, after procuring a license as provided in this act, shall at any time be guilty of any act of recklessness, carelessness or negligence while running an engine, by which any damage to persons or property is done; or who

shall within six hours before, or during the time he is engaged in running an engine, be in a state of intoxication, shall forfeit his license, with all the rights and privileges acquired by it, indefinitely or for a stated period, as the board may determine after notifying such engineer to appear before the board, and enquiring into his act or conduct. It shall be the duty of the board to determine whether the engineer is unfit or incompetent by reason of any act, or habit unknown at the time of his examination, or acquired or formed subsequent to it, and if it is made to appear that he is unfit or incompetent from any cause, the board shall revoke or cancel his license and shall notify every railroad in this State of the action of the board.

Revocation of license.

Board appointed by Governor.

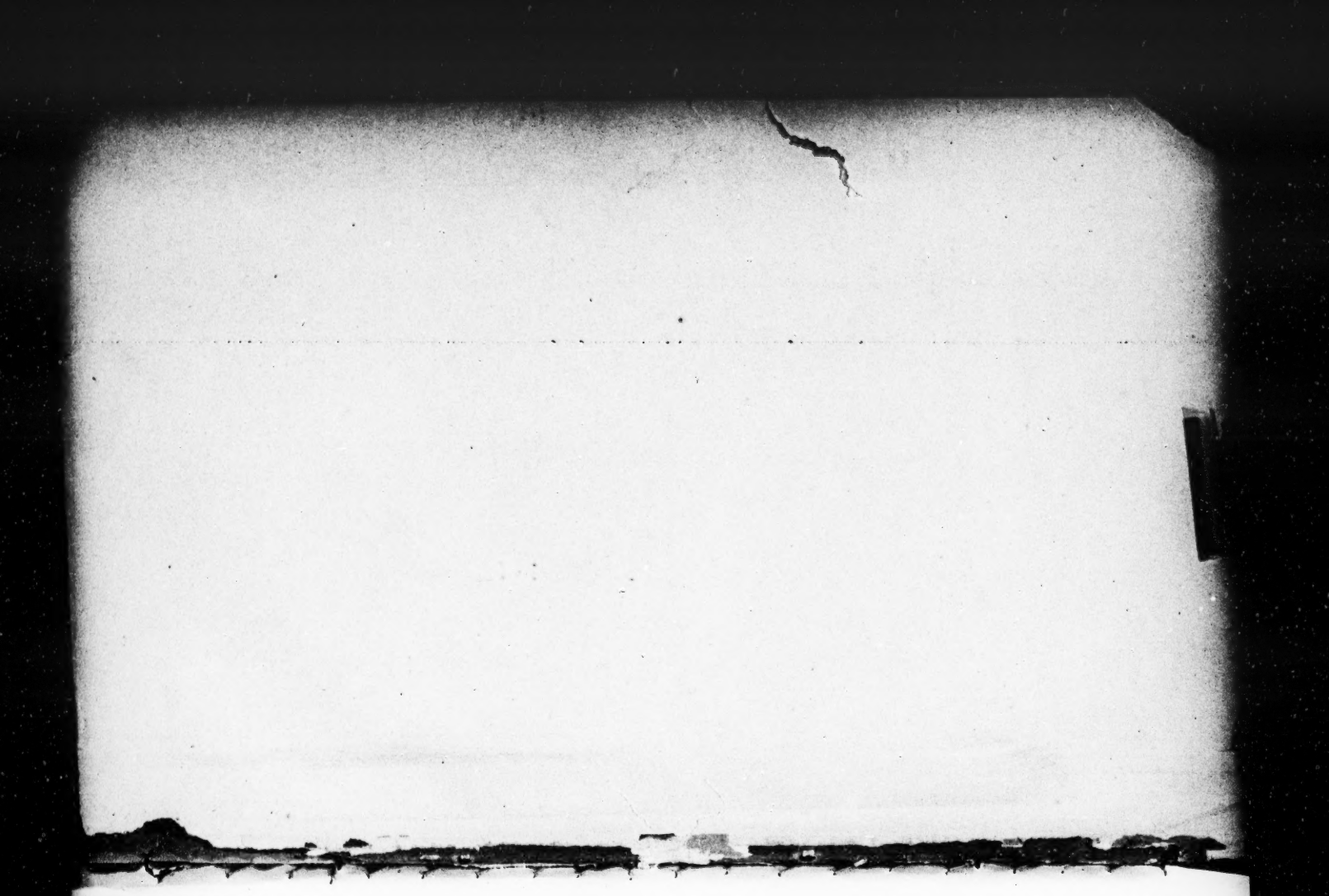
SEC. 6. *Be it further enacted*, That it shall be the duty of the Governor, as soon after the approval of this act as practicable, to appoint and commission five skilled mechanics, one of whom shall reside in Birmingham, one in Montgomery, one in Mobile, one in Selma, and one in Eufaula, who shall constitute a board of examiners for locomotive engineers. It shall be the duty of said board to examine locomotive engineers, issue licenses, hear causes of complaint, revoke or cancel licenses, and perform such duties as are provided in this act: *Provided*, That any one of said board shall have authority to examine applicants for licenses, and if the applicant is found competent, to issue license to him; *Provided further*, that for every examination provided in this act, the board or member thereof making the examination shall be entitled to five dollars, to be paid by the applicant.

Fees.

SEC. 7. *Be it further enacted*, That all engineers now employed in running or operating engines upon railroads in this State, shall have three months after the appointment of the board herein provided, within which to be examined and to obtain license.

Penalties.

SEC. 8. *Be it further enacted*, That any engineer violating the provisions of this act, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than fifty, nor more than five hundred dollars, and may also be sentenced to hard labor for the county for not more than six months.



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144-465

SUPREME COURT OF THE UNITED STATES

JOSEPH J. SMITH,
vs.
STATE OF ALABAMA,
No. 1009

Writ of Error to the Supreme Court of Alabama.

BRIEF FOR DEFENDANT.

SUPREME COURT OF THE UNITED STATES.

JOSEPH J. SMITH,
vs.
STATE OF ALABAMA,
No. 1009.

Writ of Error to the Supreme Court of Alabama.

BRIEF FOR DEFENDANT.

This case involves the constitutionality of an act of the General Assembly of Alabama, entitled "An Act to require locomotive engineers in this State, to be examined and licensed by a board to be appointed by the Governor for that purpose" (Acts of 1886–7, pp. 100–102). This statute is attacked here on the ground that it is a regulation of inter-State commerce, and was attacked in the court below on the further ground that it operates to deprive a citizen of his rights without due process of law, which latter point appears not to be insisted on here. The Supreme Court of Alabama in *McDonald's* case, upon the authority of which this case was decided adversely to the plaintiff in error, held that neither of these objections were tenable, and that the act in question was constitutional and valid.—*McDonald v. State*, 81 Ala. 279.

THE STATUTE.

An examination of this act will disclose that it proceeds upon the theory that the business of driving a locomotive engine is dangerous to the public; that skill and care in the

operative are necessary to an avoidance of disaster, and that the State, charged as it is with the protection of life and property within its borders, has a right to insist in the performance of the duty to afford this protection; that none but competent, skilled and careful operatives shall engage in this dangerous employment, and to take reasonable measures to ascertain the fitness of such operatives and to minimize the danger to the public by the exclusion of unfit persons.

The statute is in no sense a revenue measure. Only a small fee is required to be paid, and this not for the issuance of the license, but for the *examination*—not as paying for a privilege, but as compensation for services rendered at the instance of the person who pays it—and is to be paid to the examiners by the applicant himself, whether he is at the time engaged in driving an engine or not, and whether he is licensed or not; and when paid it is appropriated exclusively to the benefit of the examiners in recompense for their services. In no case, in the contemplation of this law, would this fee ever be paid by the employer of the operative, but, on the contrary, it is to be paid whether with respect to the particular applicant there is an employer; and in no case is it contemplated that the fee should ever be paid but once, unless the applicant is found to be incompetent upon one and applies for a subsequent examination. The license once issued is good for all time, subject to forfeiture for cause.

The powers of the board of examiners are not arbitrary. Such discretion as is vested in them is judicial discretion, and therefore subject to judicial supervision. The facts which make it their duty to issue a license, as well as those which authorize them to annul a license once issued, are clearly indicated in the statute, and their action in any instance may be controlled by *mandamus* or *certiorari*—remedies which, in Alabama especially, have a broad corrective operation.

The act is reasonable in its requirements as to the quali-

fications which shall be a predicate for the issuance of license. The applicant must have that knowledge of practical mechanics which is essential to his competency as a locomotive engineer, and a practical knowledge "of operating a locomotive engine," and in addition to this he must be a careful and a temperate man, qualities not less essential in this hazardous calling than a knowledge of his business.

THE FACTS

which are involved here, may be said to be of two classes—those which appear in the record and those which do not so appear, but of which the court will take judicial cognizance. The facts of the first class seem to be fairly stated in the brief for plaintiff in error, except perhaps that it does not sufficiently appear in that statement that passengers and freight passing between points, both of which are in Alabama, were transported on the trains drawn by plaintiff's engine, and as to these his duties concerned only commerce within the State, and he was therefore in no sense engaged *solely* in inter-State commerce. Of the latter class of facts are those which relate to the character of the employment, the locality so to speak of plaintiff's engagement therein, the necessity of police regulation thereof, and the reasonableness of the measures taken by Alabama to that end.

This court will take judicial cognizance of the hazardous character, subjectively and objectively, of the employment sought to be regulated; of the care and skill in the employe essential to an avoidance of disaster to life and property; of the necessary exposure of life and property to the consequences of a lack of such care and skill; and, if it be material, of the fact that an engineer must be familiar with the physical condition and peculiarities of the line over which he runs, and that therefore these "runs" of these employees, as in the case at bar, are in a sense local—rarely extending into more than two States, from which it results that the requirements of this statute, even should it be

adopted in all the States, would not be unreasonable, or onerous in any given instance.

ARGUMENT.

It is admitted, of course, that the reference of this legislation of Alabama to the "Police Power" of the States does not of necessity give any strength to the case of the defendant in error, and that to show simply and only that this is a "police regulation" will not avail to sustain the judgment below. That power has its limitations like every other governmental power, and it will be essential for us to show, not only that the act in question operates a police regulation, but also and beyond that, that it does not exceed those limitations either as to the subject matter regulated or as to the manner—the reasonableness of the regulation itself—and this we hope to do, keeping in mind that class of limitations on the exercise of this power by the States which results from the lodgment of the power to regulate commerce among the States in the Congress of the United States.

It will not, I assume, be denied that it is the primary and paramount duty of a State to provide for the protection and preservation of the lives and property of its citizens and of strangers within its gates. It can not be successfully insisted, I think, that there is any higher duty or more well established power than this known either to State or Federal jurisprudence. It is, too, a duty and a power that in the allotment of governmental functions under our complex and dual system can only be fully and effectually exercised and performed, in most cases by the States. "The State is intrusted with the duty of creating and maintaining all those internal regulations which are necessary for the preservation of, and the prevention of injury to, the rights of others."

Tied. Lim. Police Powers, Sec. 201.

"It is not only the right but the bounden and solemn duty of State to advance the safety, happiness and prosper-

ity, and to provide for the general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject is not surrendered by the constitution of the United States.

The Mayor, &c. v. Miln, 11 Pet. 102.

And unquestionably the State may as well take reasonable measures to prevent the infraction of the rights of others in the first instance as it may provide punishment or compensation for an infraction once committed.

In the premises here involved the State of Alabama, I submit, has as much right, and it is as much Alabama's duty to take reasonable measures to avoid the loss of life through recklessness on the part of an employee engaged in an employment greatly dangerous to the lives of others, as it has the right and as it is the State's duty to punish such employee for the reckless destruction of life, after the fact; and to deny the right in the one case is to deny it in both. But to these generalities—which are indeed axiomatic—it will be replied that the police power of Alabama is limited by that other and higher power which reposes the regulation of commerce among the States in Congress, and that the statute of Alabama is an unconstitutional encroachment upon Federal prerogative. I shall insist further on that this enactment will neither regulate or even affect inter-State commerce, but to meet the case in every possible aspect, I will here, without admitting or believing that it is necessary to the case of the defendant in error, to sustain the position, submit this proposition; *that in the absence of Congressional legislation a State may exercise and perform the power and duty of protecting life and property by measures which in accomplishing these ends, incidentally affect, or even incidentally regulate commerce among the States.* While there are some expressions to be found in the adjudged cases which seem to be against this doctrine, I have been unable to find that it has ever been denied by this court in a case which fairly presented it; and on the other hand, its decision was expressly pretermitted in one case, and in several others it has been directly recognized to be the law.

Thus, in the case of *Chy Lung v. Freeman et al*, the court say: "We are not called upon in this case to decide for or "against the right of a State, in the absence of legislation "by Congress, to protect herself by necessary and proper "laws against paupers and convicted criminals from abroad; "nor to lay down the definite limit of such right if it "exist."

Chy Lung v. Freeman *et al*, 92 U. S., 280.

It was conceded that the exercise of such a right by the State would operate a regulation of commerce with foreign nations; and as late as 1875, when this case was decided, the power of the State so to regulate commerce, was deemed an open question.

In the later case of Munn v. Illinois, it is held that a State may exercise its police power "even though in doing "so it may incidentally operate upon commerce outside of "its immediate jurisdiction."

Munn v. Illinois, 94 U. S. 135.

In the case of Railroad Co. v. Husen, decided in 1877, it is held that within the scope of the necessity for the protection of life, health, and property, a State may enact regulations which incidentally affect inter-State commerce.

Railroad Co. v. Husen, 95 U. S. 473.

In Patterson v. Kentucky it is said that while this court has never hesitated to guard the commercial power of Congress from the encroachment of State legislation, "it has "nevertheless, with marked distinctness and uniformity, "recognized the necessity growing out of the fundamental "conditions of civil society, of upholding State police regu- "lations which were enacted in good faith and had appro- "priate and direct connection with that protection to life, "health and property which each State owes to its citizens," and that "by the settled doctrine of this court the police "power extends, at least, to the protection of the lives, the "health and the property of the community against the in- "jurious exercise of any citizen of his own rights."

Patterson v. Kentucky, 97 U. S., 504.

And with respect to regulations of pilotage, and of buoys and beacons in navagable waters, it is said in the case of The County of Mobile v. Kimball, admitting these to be regulations of inter-State or foreign commerce, "that the "power which every State possesses, sometimes termed its "police power, by which it legislates for the protection of "the lives, health and property of its people, would justify "measures of this kind."

County of Mobile v. Kimball, 102 U. S., 698.

In the case of Morgan v. Louisiana, which I believe is the latest adjudication on the subject, it is held that while some of the provisions of a State quarantine law may amount to a regulation of both foreign and inter-State commerce, though not so designed, they belong to that class of regulations "which the States may establish until Congress "acts in the matter by covering the same ground or forbid-"ding State laws."

Morgan v. Louisiana, 118 U. S. 455.

And this decision (as well as the later ones on State regulations of pilotage) is not predicated on the idea solely that Congress has adopted the quarantine (and pilotage) laws of the States. On the contrary, after referring to that fact as one of two reasons for holding the State law valid, the court proceeds: "But aside from this, quarantine laws belong to "that class of State legislation which, whether passed with "intent to regulate commerce or not, must be admitted to "have that effect, and which are valid until displaced or "contravened by some legislation of Congress."

Ib. 465.

It would be difficult to conceive a stronger case as a crucial test of the right of a State to protect its people and property by laws appropriate to that end, and which as an incident thereto regulated commerce among the States and with foreign nations, than this case of Morgan v. Louisiana; and it was most strongly put by the learned judge who delivered the opinion. In his language this Louisiana law

"undoubtedly is, in some sense a regulation of commerce. "It arrests a vessel on a voyage which may have been a long "one. It may affect commerce among the States where the "vessel is coming from some other State of the Union than "Louisiana, and it may affect commerce with foreign nations "where the vessel arrested comes from a foreign port. This "interruption of the voyage may be for days or for weeks. "It extends to the vessel, the cargo, the officers and seamen, "and the passengers;" and in addition to all this the vessel is charged with a fee for an examination of its sanitary condition, to which it is forced to submit, and subjected to heavy penalties for violations of sanitary regulations. And all of these regulations of the State of Louisiana, with their direct effect upon commerce, with their charges upon the vehicles of commerce themselves, and with all their penalties, are upheld on the broad and beneficent ground that in the absence of congressional legislation the States have the power to protect life and property by measures which incidentally affect and regulate inter-State and foreign commerce.

It is true that one reason for the conclusions reached is stated to be that the rules which should govern quarantine may, in many respects, be different in different localities, and, therefore, be better understood and more wisely established by local authorities; but I submit if the right exists at all in the State it must stand upon a broader basis than this. In the first place I am unable to conceive why an uniform system of quarantine may not be established by the general government. Minor details of such a system might be under a national law—as they are under all State laws—left to the discretion of the officers in charge. But I can see no reason why the general rules of examination and inspection, of fumigation and detention, of the manner of compensating officers, would not apply as well to an infected ship entering the port of New York as one entering the port of New Orleans; and it can readily be conceived how the quarantine regulations of one State may prove

futile and abortive because another State similarly exposed has different regulations or fails to put them into operation.

It is the element of danger to the public—to life, and health, and property—in a given employment or business which constitutes the predicate for the exercise of governmental powers of protection. Every governmental entity has this power—this right of self-defense—as every individual has it; and the bare fact that as to a particular danger, another governmental entity has the right to exercise it, but does not so exercise it, can not in reason and principle be held to take away that great primal right of self-protection; and the State can not be compelled, under any just and reasonable construction of the Constitution, to inaction when the lives and health and property of its citizens are threatened by and in danger of destruction from the prosecution of an hazardous business within its limits, simply and only because Congress has the right—which it has persistently failed to exercise—to establish an uniform regulation of the business which will effect the protection the State seeks to provide. The commercial power of Congress is not encroached upon by this construction. There is no expressed or implied denial of the supreme right of the Federal legislature to take entire control of the subject-matter of these regulations, and avoid all State laws. Whenever it shall appear that such State regulations are unwise, are burdensome to commerce, or are not adapted to the end in view, Congress may avoid them, and in exercising its right to regulate commerce, perform its duty of affording the protection which some governmental agency must afford. Commerce itself is not endangered by this construction. There must be a necessity for such State regulations, and they must be commensurate with, and not in excess of, that necessity. If they operate the regulation of commerce to an extent or in a manner not essential to secure the protection which is their ostensible purpose, they cease to be police measures primarily with the regulation of commerce as a mere incident to the attainment of a constitutional end,

and become, primarily, regulations of commerce, with the local protection of life and property as a mere incident to the attainment of an unconstitutional end. In the one case, these measures are referable to the police power, and will stand because the State has this power in the particular instance—and there is a necessity for its exercise which has not been exceeded. In the other case they are referable to the power to regulate commerce among the States, and must fall, because no State has this power. Whether such necessity exists in any case, and whether that necessity has been met by appropriate and reasonable enactments by the State, and no more, are questions for the courts. If there was no necessity for protection, there is no field for the exercise of police power, and the State legislation will be held inoperative and void; or if there be a necessity, and its scope has been exceeded by regulations which affect commerce to a greater extent than was essential to reasonably meet it, the State law must be held inoperative and void.

Patterson v. Kentucky, 97 U. S. 504.
Railroad Co. v. Hasen, 95 U. S. 465.
Chy Lung v. Freeman, 92 U. S. 280.

Thus, there are two safeguards, adequate and complete, against the unwarranted encroachment of State legislation on Congressional powers, in the exercise of police powers by the States, one by the interposition of Congress which may occur at any time, and the other through the action of the courts.

The doctrine frequently announced by this Court, and well established on authority and reason, that as to commercial matters which admit of uniformity of regulation, the failure of Congress to regulate is a declaration that there shall be no regulation, cannot be applied to a regulation which is necessary and appropriate to the protection of life, health and property. It would be an anomaly indeed to construe the inaction of Congress, in the case at bar, to be a declaration to the State of Alabama that here

is a man engaged in inter-State commerce in and through the State, the part he performs in that commerce is fraught with great peril to your citizens, and the citizens of other States within your borders in their persons and estates. To obviate this peril and to afford protection to life and property within your gates, it is essential that this man should possess skill in his business, and that he should be a careful and a temperate man, and while it is primarily your duty to afford every reasonable protection to life and property, and while the most reasonable mode of affording this protection is to require the examination of this man, and a certification of his fitness, or to prevent his engaging in this business if he is unfit, yet, unskilled, and reckless, and intemperate though he may be, and is, he must be allowed to go on with the work of reckless destruction of life and property, because it is presumed that Congress by failing to act has declared that there must be no interference looking to a protection of such danger and destruction.

This court has never, that I am aware of, in a case like this, in which the element of danger to the public, and the necessity for local prevention against it co-existed, applied that doctrine.

Let this position be illustrated. Take, for an example, the case of Robbins, in which it was held that the agent of a non-resident house, could not be taxed for exhibiting samples of goods and soliciting orders in the Shelby Taxing District. No case has perhaps gone further in limitation of the power of the State, and in upholding the power of Congress as to matters which affect inter-State commerce. In that case this doctrine of the exclusion of State power by the force of the constitutional provision itself, regardless of inaction of Congress, is broadly announced. Now let the element of danger to the citizens and property of Memphis be injected into the business thus carried on by Robbins. Let it be supposed that the prosecution of inter-State commerce, in which he was engaged, involved the manipulation of samples of some highly inflamable and com-

bustible commodity; that this manipulation required, to an avoidence of disaster to life and property, great skill and care on the part of Robbins, and that without the possession on his part of this skill, and unless he was a careful and sober man, such disaster was inevitable. Surely it could not be insisted in such case, that because Robbins was engaged in inter-State commerce, and because the business which he was transacting was capable of uniform regulation by Congress, as it unquestionably would be, and because Congress had failed to provide such a regulation, the State of Tennessee had no right, by reasonable preventive measures to protect its citizens from great disaster to their lives and property.

That it could do so, notwithstanding commerce was incidentally regulated by such measure, and in a particular, too, susceptible of an uniform regulation by Congress, and in which Congress had failed to act, has never been denied by this Court, and the logic of the adjudged cases goes to sustain such action by the State.

Patterson v. Kentucky, 97 U. S. 504.

Take another example supplied by the decisions of this court. A statute of Missouri prohibitted the driving of Texas cattle into or through that State between certain dates in each year. This business was held to be inter-State commerce, and the Missouri statute a regulation of it, beyond the power of the State to make, in the way and for the purpose it was attempted to be made. But suppose there had been an element of danger in this business, aside from that of infection, upon which it was sought to sustain this legislation. Suppose the cattle had been vicious animals or, whether vicious or not, there was great danger to persons and property along the route over which they were being driven, and that to an avoidance of this danger, it was essential that there should be a sufficient number of competent guards or herdsmen, to prevent a "stampede" for instance. This is inter-State commerce, and undoubt-

edly capable of an uniform system of regulations by Congress. Yet, surely, Congress has not, by its inaction, forbidden Missouri to protect its people against this danger, by providing, if necessity be, reasonable measures to that end, although such measures will incidentally affect commerce.

There can scarcely be a doubt that the States, in the absence of Congressional legislation, may enact laws commensurate with the necessity, and with provisions appropriate to the end, to prevent the landing in their ports of the pauper and criminal classes.

The City of New York v. Miln, 11 Pet. 103.

And this doctrine is virtually affirmed in two cases cited here by plaintiff in error.

Henderson v. New York, 92 U. S. 259.

People v. Com. General, 107 U. S. 59.

And this is a matter which, beyond all question, can be best regulated by an uniform system established by Congress.

The Supreme Court of Alabama, in the case of McDonald v. State, say: "There are many police regulations of this "nature incidentally affecting commerce, which have been "sustained by the courts. It is well settled the States may "pass laws requiring railroads running from one State to "another to fence their tracks; to ring a bell or blow a "whistle on approaching a crossing or highway; to erect "gates and bridges and keep flagmen at dangerous places on "highways, to stop for reasonable times at certain stations; "to fix and post printed time tables, rates of fare and freight "and other things of like character, having reasonably in "view the prevention of fraud and extortion or other injury, "and the preservation of the safety of the public."

McDonald v. State, 81 Ala. 283.

(Citing) Railroad Co. v. Fuller, 17 Wall, 560.

Mobile, &c. R. R. Co. v. State, 51 Miss. 137.

Comm. v. E. R. R. Co., 103 Mass. 254.

People v. Boston & Alb. R. R. Co., 70 N. Y. 569.
R. R. Com'rs v. Portland R. R. Co., 63 Me. 269.
Davidson v. State, 4 Texas Ct. Off. 545.
Tied. Lim. Pol. Powers, Sec. 194.
Cooley's Const. Lim. (5th ed.), 579, *et seq.*

That some, at least, of the matters adjudged in these cases to have been rightfully regulated by the States are capable of uniform regulation by Congress has been demonstrated by the fact that Congress has since adopted an uniform system of regulations for them by act of February 4, 1887, "To regulate Commerce."

Pilotage is the employment in maritime commerce most analogous to locomotive engineering in commerce by land. The pilot controls the movements of the ship as the engineer does that of the train. Both the pilot and the engineer have to possess certain technical knowledge and certain skill. The engineer, only in less degree than the pilot, has to be acquainted with the physical conditions of the track over which he runs. The "runs" or voyages of both may be from one State to another, or from or to a foreign country, to or from a State. There is the element of danger in both employments which can be best guarded against by regulations which look to the fitness of the employee as to knowledge, skill, character and habits. Except that there is more diversity in the physical conditions of the track of the pilot than that of the engineer—a diversity which could be easily accommodated and allowed for in national regulations of pilotage—as such diversity in these conditions though in less degree, would have to be accommodated and allowed for in any national regulation of locomotive engineering, there is no more reason for localizing the regulations of pilots than there would be for localizing the regulations of engineers, and even this reason, as I have indicated, is one of degree, so to speak, rather than of kind.

Counsel for plaintiff in error admit, in effect, that pilots

and engineers bear substantially the same relations to commerce, and they seek to avoid the effect of the decisions of this court upholding State regulations of pilots, on this statute of Alabama, by insisting that State pilotage regulations are sustained only because Congress has adopted them. This contention is unsound. While Congress has adopted these State regulations, as well as State regulations of quarantine, as we have seen, this court, in its latest decisions on these subjects, respectively, has held that these regulations are valid exercises of the police powers of the States, irrespective of their ratification and adoption by Congress. In the case of County of Mobile v. Kimball *supra*, the language of the court is, "Their" (the States,) "authority to act upon the matter" (of pilotage) "and regu-"late the whole subject, in the absence of legislation by Congress, has been recognized by this court in repeated instances," and the opinion in Cooley v. Wardens of Philadelphia, is quoted with approval to the effect that the act of Congress, of 1789, declaring that pilots should continue to be regulated by State laws, "manifests the understand-"ing of Congress at the outset of the government that the "nature of this subject is not such as to require its exclu-"sive legislation." And in Morgan v. Louisiana, it is, as we have seen, expressly decided that State quarantine laws do not derive their validity from their adoption by Congress.

County of Mobile v. Kimball, 102 U. S. 698.
Cooley v. Wardes, &c., 12 How. 298.
Morgan v. Louisiana, 118 U. S. 455.

Counsel for plaintiff insist that "this Court has frequently "decided that the business" (of commerce among the States and with foreign nations, I presume,) "must be open and "free to all persons, unless restricted by Congressional "legislation," and they cite to this proposition several cases, none of which, I respectfully submit, sustains it. The first of these cases is that of Weber v. Virginia, which involved a statute of the defendant State which imposed heavier

burdens on the sale of articles manufactured in other States than upon like articles manufactured in Virginia, and the act was declared unconstitutional solely and only on the ground that it discriminated against the products of other States. Another of the cases, thus cited, involved in reality the constitutionality of an act of New York which imposed a tax on a ship owner graduated by the number of passengers landed from his ships, and was, therefore, a direct burden upon foreign commerce.

Henderson v. New York, 92 U. S. 259.

And the third and last case cited to sustain this proposition involved a statute which imposed a direct tax for every alien passenger who came by vessel into the port of New York.

People v. Compagnie Gênêrale, 107 U. S. 49.

In none of these cases is there the slightest intimation that a State may not do what Alabama has done here—take reasonable steps to protect her citizens, and the public generally, from disasters consequent upon the employment of unfit and reckless operatives in the prosecution of dangerous employments, notwithstanding these employments are a part of inter-State commerce, until Congress has exercised its power of regulation in the premises.

Has Congress done this? Does the act of February 4, 1887, "to regulate commerce," provide any regulation on this subject? Unquestionably not. The nearest approach that the ingenuity of the learned counsel for the plaintiff in error could discover in that act to a regulation of the employment of locomotive engineers, was in a definition of the term "transportation," which makes that term "include all instrumentalities of shipment or carriage." The whole purpose and scope of that act is to regulate *charges* of common carriers for the transportation of freight and passengers, and to prevent discrimination and extortion in the carriage and rates for the carriage of commerce; and it might be said that it operates to avoid all State legislation

on the subjects of pilotage, quarantine, and the various other matters referred to in McDonald v. State, *supra*, with as much propriety as to insist that it avoids this statute of Alabama, on a subject to which it does not refer. In view of the necessity for regulation of locomotive engineering—a necessity known to Congress as to everybody else—in view of the fact, also known, presumptively, to Congress, that some of the States have already enacted laws to this end, and in view of the further fact that Congress having the general subject of commerce regulation before it, failed to "act in this matter by *covering the same grouud or forbidding State laws*," the conclusion is irresistible that it intended State regulation to continue, and manifested its understanding "that the nature of this subject is not such as to require its exclusive legislation."

Morgan v. Louisiana, 118 U. S. 462.
County of Mobile v. Kimball, 102 U. S. 698.
Cooley v. Wardens, &c., 12 How. 298.

As to the necessity for the regulation of locomotive engineering here involved, and whether this regulation is commensurate only with that necessity—not burdensome, vexatious or excessive, but appropriate to the protection which is its object and purpose—I need add nothing here to what has been said in the oral argument, further than to again call the court's attention to the facts existing in its judicial cognizance, that the people of Alabama and the public generally are constantly exposed to great peril from the reckless or unskillful prosecution of this business; that this regulation, so far from being a burden to commerce, will directly benefit it, and to the further fact that neither the existence of the necessity, nor the propriety of the measures provided to meet it, is questioned by plaintiff's counsel, except by a broad denial of the State's right to legislate on the subject at all.

SECOND.

So far I have argued this case upon the assumption that this statute of Alabama will operate an incidental regulation of commerce, and now, while still asserting that even upon that assumption this court must sustain the judgment below, I will briefly consider the case in another aspect. The statute of Alabama I submit not only does not regulate commerce incidentally or otherwise, but does not even affect it, except indeed to its manifest advantage. It is by no means of easy inference or demonstration that to require locomotive engineers to have their fitness for the dangerous duties of their positions ascertained and certified by an expert commission, and to pay a reasonable compensation for the services of such commission, has or could have any effect whatever on commerce, except indeed to conserve its safety incidentally. It is not conceivable that the pittance required to be paid once in the lifetime of each engineer, by the engineer himself, for services rendered to him, could become a burden upon, or, in any event, be paid by commerce. Such is not the contemplation or necessary operation of the statute. That commerce will be affected by this act is not brought nearer a demonstration by giving to regulations of this kind the widest possible operation consequent upon their adoption by any number of States. In that case the sum of the fees required to be paid in all the States would bear the same relation to the commerce of them all that the cost of administering the law in one State would bear to the commerce passing through that State. And with respect to individual engineers, it is matter of common knowledge that their "runs," as they are called, are rarely, if ever, as long as the width or length of average States, and there are probably no instances in which these "runs" extend into more than two or three States. In the case at bar the "run" extends into only two States, so that regulations like these in any number of States would not become oppressive to the operatives themselves.

Nor can an argument against this law be predicated upon the idea that if a State may fix a fee of five dollars, it may as well require the payment of one hundred or a thousand dollars, and, therefore, that while the fee as fixed is too insignificant to affect commerce, yet to uphold it would be to establish a principle upon which prohibitory fees could be required, because to uphold this law would establish no such principle. A police regulation requiring a prohibitory or unreasonable fee as a condition precedent to engaging in a business not bad in itself, would not be upheld by any court. On principles already referred to, such a requirement would, in a case like this, be unreasonable and in excess of the necessity sought to be met, and the reasonableness of all such regulations is a judicial question. This law, in other words, is to be tested by its terms as they are, and not by what it might have contained.

Yick Wo v. Hopkins, 118 U. S. 371.

It is true that commerce is incidentally benefitted, and in that way affected by this law, but that fact, so far from giving ground to declare it unconstitutional, is proper to be considered as a reason for upholding it.

As in the case of Morgan v. Louisiana, *supra*, the examination and certification required in this act is of direct value to the engineer who pays for them, as a continuing evidence of his competency, to be used in securing positions out of as well as in Alabama; and if the person examined is competent he receives a *quit pro quo* for the fee he pays. If he is not competent, it will not be contended that he ought to be employed in this business. The examination and certification is of great benefit to railroad companies in having the competency of these men tested by other means than by what may be disastrous experiments, and to the transportation of commerce in the safeguard thus afforded for its protection.

But we may admit that commerce is affected by this law—that is not the point at issue in any aspect of this

case. Plaintiff in error must go further than that and show not only that these regulations have some influence on commerce itself, but that they *regulate it.* As was said in the case of The State Tax on Railway Gross Receipts, 15 Wall. "293; "it is not everything that affects commerce that "amounts to a regulation of it within the meaning of the "Constitution," and I take it, that a law before it could be said to regulate commerce would have to be shown to have some necessary, or at least probable, influence, upon the subjects of commerce, upon the property and persons transported, upon the charges for such transportation, upon the facility with which such transportation is accomplished, and will have in some way to increase or diminish or control those charges, or to hinder and delay or prevent such transportation. These are matters that Congress acted upon when it undertook "to regulate commerce," and these only. The law here involved can have no such operation or effect, and this could not have been demonstrated more clearly than it is by the arguments, and especially the illustration used by counsel for plaintiff in error.

The hindrance and delay of commerce which they insist will result from this law, they seek to demonstrate by the possible, but by no means probable, supposition that the engineers on their trains coming from Mississippi into Alabama, will drop dead at or near the State line; that under this law the fireman would not be allowed to carry the trains on into Alabama, and that therefore commerce is regulated because their trains would be required to stop until other engineers could be secured. Laws are not made in contemplation of such extreme possibilities, and are not to be tested by their operation in cases which in all human probability can never happen. It might with much more plausibility be insisted that a State law requiring a train to run at a low rate of speed through a crowded city, is unconstitutional because the delay thus occasioned prevented a connection with the trains of another road and resulted in the delay of passengers and freight. If the Mobile &

Ohio Company has reason to apprehend that its engineers will suddenly drop dead, and that they will select the State line between Mississippi and Alabama as the scene of transition, they should get other operatives who are not so fated, or if their firemen are competent engineers they should be licensed, and if they are not competent, they should not be allowed to run trains to prevent any amount of delay of transportation. This is the only particular in which it is contended that this act will have a regulative effect on commerce itself, and that it is so, is very persuasive to show that commerce will not be regulated at all. I do not mean, of course, to be understood as saying that counsel for plaintiff do not claim that this law regulates commerce in other ways than this, but that this is the only particular in which they claim commerce itself, as distinguished from mere operatives engaged in it, will be affected.

Third.

I insist further that, whether this law affects or regulates commerce or not, and whether States may incidentally regulate commerce under their police power, when necessary to public safety or not, it is valid because it operates locally only. The plaintiff in error was engaged, as the record shows, in commerce within the State of Alabama, as well as beyond it. As to this commerce, there can be no doubt of the State's right to make any sort of a regulation it deems wise. This power of the State is just as sacred—and certainly more exclusive—as the power of Congress over inter-state commerce. The State cannot be prevented its exercise in the way here attempted because the employee whose connection with State commerce is regulated, is also connected with inter-state commerce—any more than Congress can be prevented the exercise of the power it has exercised by the act of 1887, over common carriers, because those same carriers are also engaged in commerce within the States respectively.

But this legislation is local in another aspect. The fact

that persons and property, in transit, constitute commerce, and the fact that when in transit through Alabama, they constitute inter-state commerce, do not absolve the State of its duty to protect them while they are in the State or its duty to protect its own citizens and their property from the perils incident to the passage of this commerce through the State, and its measures to these ends are, of course and of necessity, local in their scope, relating entirely to acts and omissions in the State, and designed in execution of the State's duty, to protect this commerce while it is in her borders, as also its duty of protection to its own citizens.

The other question, insisted on in the court below but not referred to in the brief of plaintiff's counsel here, was whether the power given to the board of examiners to grant or refuse licenses, &c., might not operate to deprive a citizen of his rights without due process of law. This question I think is sufficiently answered in the case of McDonald v. State, and in the authorities there cited and also in a recent decision of this Court.

McDonald v. State, 81 Ala. 284 (and cases cited).

Yick Wo v. Hopkins, 118 U. S. 356.

The powers vested in the board are judicial in their nature and subject to judicial control, which, under the broad operation given to the writs of *mandamus* and *certiorari* in Alabama, can there be made especially effective.

Acts of Ala. 1878–9, p. 150.

Respectfully submitted,

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